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IN THE

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1956.

No. 878

MILTON D. HARTMAN, GEORGE HARTMAN, JANE I. HARTMAN, HAZEL K. HARTMAN, and MILTON D. HARTMAN, as Executor of the Will of Pauline Morehead,
Petitioners,

vs.

FRED J. LAUCHLI, Trustee of the Hartman Corporation of America,
Respondent.

## PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit.

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Respondent.

## PETITION FOR WRIT OF CERTIORARI

**To the United States Court of Appeals for the Eighth Circuit.**

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioners, Milton D. Hartman, George Hartman, Jane I. Hartman, Hazel K. Hartman and Milton D. Hartman, as Executor of the Will of Pauline Morehead, pray that a Writ of Certiorari be issued to the United States Court of Appeals for the Eighth Circuit, to review the judgment of that Court in Cause No. 15465, wherein that Court, on November 20, 1956, affirmed the judgment of

the District Court for the Eastern District of Missouri as to Count VII of the Respondent's complaint in the lower court in the sum of $150,372.97 and remanded Count VI of said complaint for a new trial in which a judgment had been entered by the lower court in the sum of $421,629.21, in which said Counts VI and VII of said action the respondents herein sought to recover large sums of money alleged to be due from the petitioners herein to Hartman Corporation of America, a bankrupt, on the theory of fraudulent transfers of assets from the bankrupt family corporation to a family partnership.

January 4, 1957, the said United States Court of Appeals for the Eighth Circuit in said Cause No. 15465, on motion for rehearing, granted leave to petitioners to file certain exhibits; modified the opinion by substituting the date July 15, 1944, for the date March 15, 1944, and denied petitioners' petition for rehearing.

It was further ordered that Appellee's (Respondent's) petition for modification of the opinion for rehearing as to Count VI be denied.

## OPINIONS BELOW.

The opinions below appear:

1. The opinion and judgment of the Court below is not officially reported. It is printed in the appendix hereto, page 17.

The opinion and judgment of the Court below on rehearing is printed in the appendix hereto, page 37.

2. The opinion of the District Judge, Roy W. Harper, is set out in the record, (page 32) filed herewith and the findings of fact, conclusions of law and judgment and decree of the District Court Judge, Roy W. Harper, is set out in the record (page 43) filed herewith.

## JURISDICTION.

The final opinion, on rehearing, and the mandate of the United States Court of Appeals for the Eighth Circuit was entered under date of January 4, 1957 and lodged in the District Court under date of January 16, 1957. The jurisdiction of this Court is invoked under the provisions of 28 U. S. C., Section 1254 (1).

## QUESTIONS PRESENTED.

Counts II, III and IV of the original complaint were dismissed by complainant (Respondent). Counts I and V were decided by the District Court in favor of your petitioners and are not appealed from by complainant (respondent). There are no questions under those Counts of the complaint.

I.

The judgments entered on Count VI and on Count VII of the original complaint were given under the theory that "a transfer made . . . by a . . . bankrupt, under a State Law applicable thereto, is fraudulent as against any creditor" and is null and void as against the Trustee of such debtor [Title 11, Sec. 110 (e) (1), U. S. C.]. The State law of Missouri (Sec. 428.020, Revised Statutes of Missouri, 1949), provides, in essence, that every conveyance made with the intent to hinder, delay or defraud creditors of their lawful debts or demands shall be deemed as against said creditors, prior and subsequent, to be void.

The trial record shows and the Court of Appeals found that the family partnership and the bankrupt were organized simultaneously about September 1, 1943. Between that date and January 13, 1946, both enterprises earned or profited handsomely. The opinions of both lower courts

hold that these transactions are and were fraudulent. They were profitable—but there is no evidence that these two ventures were organized **simultaneously** for the purpose of "milking from the corporation" of its liquid assets.

The first question is: Can we presume, assume or infer fraud in the distribution of profits among the members of this family, at a time or during a period, more than four months prior to bankruptcy, when no unpaid creditors lost during that period?

II.

Thus the second question to be presented is: Did the District Court and the Court of Appeals err as a matter of law in finding that the transactions between the family partnership and the bankrupt company were brought within the terms of the statute [Title 11, Section 110 (e) (1) U. S. C.] by the mere assertion, or filing, of a claim for Federal Income Taxes, which was never allowed against the bankrupt company and is now outlawed by the Revenue Act and the regulations of the Commissioner's office?

III.

All of the transfers of money complained about and upon which this entire judgment is based occurred prior to January 13, 1945. Can a judgment for a preference under the section of the Bankruptcy Act relied upon be sustained where both Courts have found that the Bankrupt Company was not insolvent during the period in question and where no claim that insolvency existed was ever asserted?

IV.

The exhibits which the Court of Appeals permitted petitioners to file on the motion for rehearing show on their face that, in earlier proceedings in the District Court,

the "protest" filed by respondent took the position that no claim existed in favor of the commissioner and against the bankrupt company. The fourth question is: Can the respondent be heard to change his position in the United States Court of Appeals for the sole purpose of finding a convenient means of avoiding the bar of a Federal Statute under his case would otherwise be outlawed?

V.

An earlier case between the same parties was tried in the District Court. Judgment was rendered in favor of the respondent as Trustee in bankruptcy. On appeal (Hartman et al. v. Lauchli, Trustee, 194 Fed. 2d 787) the judgment of the lower court was reversed outright. The trial court in this action overruled petitioners' plea of res adjudicata. The Court of Appeals did not see fit to rule on this point.

The Fifth question is: The Earlier judgment being conclusive as to all matters which could have been asserted in the earlier case, could this case be prosecuted to a second judgment over the special plea of petitioners?

## STATUTES, FEDERAL RULES, STATE LAWS AND FEDERAL REGULATIONS INVOLVED.

The pertinent portions of Title 11, Section 110 (e) (1) U. S. C. A., Section 428.020, Revised Statutes of Missouri, 1949, Section 351.350, Revised Statutes of Missouri, 1949, Rule 18 of the Federal Rules of Civil Procedure, Chapter 70 B, Int. Rev. Code, 26 U. S. C. A., Sections 6871 and 6872, Title 11, Section 1 (11), U. S. C. A. and Title 11, Section 104 a (5) U. S. C. A., are set forth in the appendix at pp. 41-44.

## STATEMENT.

After the beginning of World War II, the otherwise profitable corporation known as the Hunter-Hartman corporation, owned jointly by Milton D. Hartman, one of the petitioners herein and Lee Hunter, was liquidated to pay out the latter party. A new corporation known as the Hartman Corporation of America was formed on or about September 1, 1943. This Company was already in negotiation with Government agencies for the manufacture of special items for the Armed Services. It was anticipated that the generators to be incorporated in the manufacture of the devices would be furnished by an Iowa manufacturing company. The President of that Company passed away and its agreement was not carried out.

The Hartman Corporation of America could not manufacture these generators. The Wind-King Company of Merrill, Iowa, could manufacture them but was not in a financial position to do so. It did not have the capital to finance the purchase of materials or meet large payrolls. The Hartman Corporation of America, obviously, could not finance a sub-contractor when under contract itself with the Government.

A family partnership, known as American Electrical Products Company was formed. It furnished the capital necessary to supply the parts for the Wind-King Company, which in turn manufactured the generators for the American Electrical Products Company. These were sold to the Herman Corporation of America at a price alleged by the Respondent herein to be above "fair value" by the proof of difference between bare cost and sales price, called "mark up," without crediting the American Electrical Products Company for overhead expenses incurred in connection therewith and without proof of the prevailing prices or recognized "fair value" of the same items on the open market at that time.

Under Count VI of the original complaint, the District Court rendered a judgment against the petitioners herein in the sum of $421,629.21. All of these transactions occurred between September 1, 1943 and July, 1944.

Under Count VI of the oriignal complaint, the District Court found that the American Electrical Products Company, the family partnership, had entered into a contract with the Bankrupt company to furnish certain engineering services. That these services were not reasonably worth and did not have the fair value charged therefor, if any were rendered, and on that theory the District Court entered judgment in the sum of $150,372.97. That last money having been paid on January 13, 1946.

Petitioners contend that the respondents failed to make a case under the Federal statute prohibiting fraudulent transfers [Title 11, Section 110, (e) (1) U. S. C. A.] and Section 428.020, Revised Statutes of Missouri, 1949. The Court of Appeals correctly held that it has "been many times held by the Courts of Missouri that a transfer, though made voluntarily and without consideration, is not void against creditors if the transfer or, at the time of the transfer, had no creditors". The opinion further held correctly that this law applied in the present case, **if there were no creditors when the transfers were made.**

The money involved here, as above stated, was paid to the petitioners, as related in Count VI, between September 3, 1943 and July, 1944, as to Count VII between Feb. 3, 1945 and January 13, 1946. No unpaid creditor who had a claim originating before the latter date is claimed save and except the **unproven allegation** that the Commissioner of Internal Revenue had a claim, first asserted in April, 1948, which related back to July 15, 1944. The Court's opinion holds: "It will be noted at the outset that there is neither evidence nor finding that the bankrupt had a single creditor during the period from September 1, 1943 to January 13, 1946—the period during

which the questioned payments were made—unless it can be said that the Government's income tax claim, assessed in 1948 'for the years 1943, 1944 and 1945', in the total amount, including penalties and interest, of $731,638.59, gave it the status of a creditor of the bankrupt in those years, because no other claim outstanding against the bankrupt at the time of the bankruptcy antedated May 29, 1946, and appellee concedes 'that, so far as the "transfers" in suit are concerned, these accounts payable would be termed as "subsequent creditors"; nor is there any evidence or finding that the bankrupt was insolvent in those years and at the time it made the questioned payments."

The opinion then held erroneously, sustaining the trial court, that an income tax claim of the Government for the years 1943, 1944 and 1945 which related back to July 15, 1944, constituted a "claim" even though there is no proof in the trial record that such claim was ever **allowed.** On the contrary, respondent's counsel, as attorney for the bankrupt, resisted the claim in the District Court and it was abandoned by the collector. Your petitioners established this fact on motion for rehearing and the Court of Appeals allowed us to file exhibits from the record of the bankruptcy proceedings in support of this fact.

Both the trial Court and the Court of Appeals found that the family partnership and the bankrupt company were organized practically simultaneously. The record establishes clearly the amount of money invested in each. The capital contributed to the family partnership for the purpose aforesaid according to the uncontraverted evidence, was a few dollars less than $300,000.00. No evidence of any kind was offered, other than the difference between the cost of materials furnished to Wind-King and the cost of the generators charged to the Bankrupt Company, as proof of fraud. Nevertheless, in the face of these findings by the Court and without any evidence of the

"fair value" of the generators furnished to the bankrupt company, the Court held these transactions to be fraudulent. The trial court entered a judgment and the Court of Appeals remanded the case for new trial as to Count VI on the theory that the respondent herein should more clearly establish the relationship between the 15th day of July, 1944 and the dates when the generators were furnished and paid for.

As to Count VII the Court of Appeals sustained the judgment of the Court below on the theory that the last money, having been paid on January 13, 1946, the debtor-creditor relationship between the Department of Internal Revenue and the Bankrupt Company antedated the first payments under the contract complained of in Count VII.

As clearly established and set forth in the opinion of the Court of Appeals in the first litigation between these parties (Hartman et al., v. Lauchli, Trustee, 194 Fed. 2d 787), the financial difficulty of the Bankrupt corporation grew out of entirely different circumstances and transactions. The transactions complained of in this action did not in any way contribute to the losses of the Bankrupt Company. These losses having occurred through subsequent unfortunate business ventures entered into during the post war period.

Both the District Court and the Court of Appeals found that during the period from September 1, 1943 to January 13, 1946, the bankrupt corporation was not insolvent.

The corporation was placed in receivership in December, 1947 and a trustee appointed for its liquidation in the Spring of 1948. Shortly, thereafter, the Director of Internal Revenue at St. Louis filed in the District Court, the document called "Report of Revenue Agent, Thomas L. Hagerty, dated March 26, 1948, attached to a letter of transmittal, dated May 28, 1948 from George J. Schoenemann, Commissioner of Internal Revenue, signed Earl

E. Waters, Acting Internal Revenue Agent in Charge, St. Louis Division. **Also letter of extension granting extension of time to July 1, 1948 to file a protest covering the above case."** The protest was filed and is part of this record. The Court of Appeals found that this report of an examining agent amounted to an "assessment" of a claim. The Court said that while the record did not use the word "assessed", the District Court found that those claims had been filed in the Bankrupt proceeding and "he took judicial knowledge" that they were both "provable claims" and "prior claims" which strongly implied that they had been assessed. Having "judicial knowledge" of a fact which does not exist, and cannot become a fact, at a cost of $576,000.00 in judgments against these petitioners brings us to this Court.

Nevertheless, the record of the trial court in the bankrupt proceedings indicates that there was a hearing, or rather a discussion on these claims, before District Judge Hulen in the summer of 1948 without determination. The record of the Bankruptcy Court indicates that the same report and claim was filed immediately thereafter in the office of the Referee in Bankruptcy where it has remained ever since without adjudication or determination of any kind.

Even if the claim of the Internal Revenue Department was provable, the assessment thereof under the provisions of Section 6872 of the Internal Revenue Code did not take place, nor was it attempted within the two year period of limitation and therefore the assessment does not exist and cannot exist. The Claim of the Internal Revenue Department has been abandoned and under the Federal law outlawed. This being the case, no claim in bankruptcy, within the meaning of the bankruptcy act, existed prior to the date of January 13, 1946 and the claims under Count VI and Count VII of the original complaint must be denied.

## REASONS FOR GRANTING THE WRIT.

### A.

The decision below should be reviewed because it erroneously interprets Section 110 (e) (1) of the Bankruptcy Act as applied under the Missouri Law (Section 428.020). The Court of Appeals correctly held and correctly stated the law which the opinion later violated as follows: "We think it is clear, under the Missouri Law, that if the Bankrupt had no creditors at the time of the questioned payments, those payments cannot be held to have been made in fraud of creditors—certainly not when the complainant has not produced evidence showing that the bankrupt, at the time of those payments, was insolvent, or was rendered so by those payments, and 'harbored the fraudulent intent to become indebted and to secrete his property as against future creditors.' Stierline v. Teschmacher, 333 Mo. 1208, 1222, 64 S. W. 2d 647, 654."

There is no evidence in the record and there was no finding by the District Court that the bankrupt was insolvent at the time of the payments complained of, or that the bankrupt was rendered insolvent by those payments. Therefore, both the District Court and the Court of Appeals in their written opinions confirmed the fact that the respondent had failed to prove these essential elements of the case at the trial.

Thus it is not necessary for the Supreme Court to review any of the facts but to look alone to the opinion of the Court of Appeals and find therefrom that the opinion is directly contrary to the law.

If the payments complained of were fraudulent or voidable under the State law, they would be voidable and fraudulent as against the respondents herein [Section 110 (e) (1), Bankruptcy Act]. But the State law as indicated by the Court of Appeals, requires that the Trustee prove

that the transfers complained of were "made or contrived with the intent to hinder, delay or defraud the bankrupt creditors. Again quoting from the correct statement of the Law by the Court below, and from its opinion, which we adopt in part: "Though this statute was enacted in substantially the same terms October 1, 1904, 1 Terr. Laws, p. 19, Sec. 19, and has ever since continued as a statute of Missouri, it has since been many times held by the Courts of Missouri, that a transfer, though made voluntarily and without consideration, is not fraudulent or void against creditors if the transferor, at the time of the transfer, had no creditors. The Supreme Court of Missouri collected the cases and treated exhaustively with this question in the case of Coleman v. Hagey, 252 Mo. 102, 158 S. W. 829, and held, upon the support of many cited cases, that the assets of a corporation, while it is solvent, **are not impressed with any trust for present or future creditors,**" and that, (p. 136): "While solvent and a going concern it holds its property like a natural person, free from the touch of general creditors, and that it may dispose of same as the judgment or wisdom of its management dictates, subject only to the provisions of its charter and those other restraints upon the conveyance of property which the law imposes as well as upon individuals as upon corporations. This Court and our courts of appeals have repeatedly recognized the correctness of this modern doctrine, and the reasoning in support of same will be found upon reference to the Missouri cases cited here, thus avoiding lengthy quotations from same" (citing many Missouri cases). With this fortification, the Court got down to the precise question here, saying (p. 133):

> "A trustee in bankruptcy in prosecuting a suit to judgment must prove the facts essential under the state law, since to hold otherwise would be but to decide that he could recover without proof of his right to do so (Miller v. Acid & Fertil Co., 211 U. S.

496, 21 Am. Bk. R. 416); and in a proceeding to set aside a conveyance or divest title, it is necessary to prove that the claim upon which the suit is based existed prior to the time of the conveyance (Stone v. Myers, 9 Minn. 303). It is no concern of the trustee what the defendants may have done or did with their property prior to the time claimants became creditors; as to them, defendants may have given away their property or conveyed it away (with no matter what purpose) and only those creditors who became such before the fraudulent conveyance have a right to complain, hence the necessity of showing the existence of the claim prior to the conveyance (Blom v. May, 43 Minn. 397)."

In accord are the more recent cases of Riggs v. Price, 277 Mo. 333, 210 S. W. 420; Dickey v. Thompson, 323 Mo. 107, 18 S. W. 2d 388.

This theory that, where the alleged transfer was made when the transferor was not insolvent and did not render him insolvent, the conveyance cannot be set aside as a fraud upon subsequent creditors, has been reasserted in numerous other Missouri cases. Christopher-Simpson Iron Works v. Bojar, 190 S. W. 615; American National Bank v. Thornborrow, 83 S. W. 771, 109 Mo. App. 639; Citizens Bank of Minnesota v. Hilkemeyer, 29 S. W. 2d 1090, 325 Mo. 849.

With the identical section before it, our Federal courts have held that in determining where a parent corporation's transfer of assets to a subsidiary was fraudulent as to the parent corporation's subsequent creditors, the solvency of the parent corporation must be determined as of the date of transfer, and the subsequent insolvency was irrelevant. Commerce Trust Co. v. Woodbury, C. C. A., 77 F. 2d 478, modifying Woodbury v. Pickering Lumber Co., D. C., 10 F. Supp. 761, and certiorari denied Woodbury v. Commerce Trust Co., 56 S. Ct. 134, 296 U. S. 614, 80 L. Ed. 435.

The opinion of the Court of Appeals in this case holds directly that the transaction complained of did not contribute to the insolvency of the bankrupt company. The opinion of the same Court in the earlier appeal, Hartman et al. v. Lauchli, Trustee, 194 Fed. 2d 787, established the cause of insolvency as something entirely different from and subsequent to the payments complained of here.

Therefore, because the opinion of the Court of Appeals is directly contrary to the Federal Statute involved, directly contrary to the previous opinions of the same Court, it should be reviewed and reversed.

B.

For another and further reason why this opinion should be reviewed, we again agree with the opinion of the Court of Appeals where it is stated that "we think it is clear under the Missouri Law, that if the bankrupt had no creditors at the time of the questioned payments, those payments cannot be held to have been made in fraud of the creditor * * *." And further "the resulting and threshold question is: Was the Government, because of its income tax claim assessed in 1948 as a deficiency for the years 1943, 1944 and 1945, a creditor of the Bankrupt in those years?" The Court held that the Government was a creditor beginning at January 15, 1944, even though the alleged claim now lies abandoned in the files and is outlawed for failure to "assess" the tax within two years.

Section 6872, Title 26, U. S. C., the Internal Revenue Code provides that the running of the period of limitations for making assessments against a bankrupt estate shall be suspended for thirty days after the date upon which notice from the receiver or other fiduciary is received by the Revenue Department, but that such suspension of the running of the statutes of limitation shall in no way be for a period in excess of two years. The report attached to this petition is dated March 26, 1948. Nothing has been done about making an assessment. No assessment has been

made and the claim has laid in the records of the Court below and in the records of the referee's office more than eight years. The code further requires [Section 104 (a) (5)] that the question of assessment of income tax against the bankrupt company, which had not been assessed prior to bankruptcy, shall be heard and determined by the Court, that is the District Court or its Referee in Bankruptcy. This was not done and the record before this Court now indicates that, while a claim was filed, no adjudication was had upon it in compliance with the above section of the bankruptcy act.

This exact question, as to whether the filing of an unproved claim, whether meritorious or not, would bring the complained of transactions within the terms of Section 110 (e) (1) has never been before this or any other Court so far as our investigation discloses. Apparently, there was no need of it as this is a most unique situation. The error of the Court of Appeals is immediately apparent in the verbiage of the opinion on rehearing, in which he stated that "while the District Court did not in his findings use the word 'assessed,' he did find that those claims had been filed in the Hartman Corporation bankruptcy proceedings, pending before him and **of which he took judicial knowledge**, and that they were both 'provable claims' and 'priority claims' which **strongly implied** that they had been 'assessed' * * *." Were they "assessed" within the meaning of the law on the facts before the Court? The Court of Appeals seems to have taken the verbiage of the protest filed against the assessment and was thereby misled by the use of that word when the scrivener really meant to say "reported" or "claimed." The whole error grows out of an unfortunate misunderstanding of the use of the word "assessed" and the definition of the term "provable claim."

Therefore, this opinion should be reviewed in the interest of justice, on the law points alone, rather than to

permit such a tremendous burden of debt to be placed upon a family who, according to their record, has already poured back into the assets of the bankrupt company, after insolvency, several hundred thousands from which the creditors benefited.

C.

Another and important question which should be reviewed is that which grows out of the fact that there is no evidence in the record, nor referred to in the opinion of the Court of Appeals, that the respondent conformed to the requirement of Missouri Law by proving the difference between the purchase price of the articles bought by the bankrupt company and the "fair value" thereof as set forth in Section 351.350, Revised Statutes of Missouri 1949.

It might be argued that we are asking this Court to reverse the conclusions of fact of the District Court and the Court of Appeals. We have no such intention. The rule of this, the highest court of the land, is that the concurrent findings of fact of two lower courts are persuasive proof in support of their judgment, but this does not relieve the United States Supreme Court of the task of examining the foundation for the findings in a particular case. Baumgartner v. U. S., 322 U. S. 665, 88 L. Ed. 1525, 65 S. C. R. 1240, rev'g (C. C. A. 8), 138 F. (2d) 29, and 47 F. Supp. 622.

## CONCLUSION.

For the reasons set forth above, it is respectfully submitted that this Petition for Writ of Certiorari should be granted.

.....
RAYMOND W. KARST,

.....
WM. J. BECKER. (Of Counsel.)

## APPENDIX.

### OPINION AND JUDGMENT.

United States Court of Appeals.
For the Eighth Circuit.

No. 15,465

Milton D. Hartman, George Hartman, Jane I. Hartman, Hazel K. Hartman and Milton D. Hartman, as Executor of the Will of Pauline Morehead,
Appellants,

vs.

Fred J. Lauchli, Trustee of Hartman Corporation of America,
Appellee.

Appeal from the United States District Court for the Eastern District of Missouri.

[November 2, 1956.]

William J. Becker for Appellants.

Kenneth Teasdale (Cobbs, Armstrong, Teasdale & Roos, and Charles E. Dapron were with him on the brief), for Appellee.

Before Johnsen, Van Oosterhout and Whittaker, Circuit Judges.

Whittaker, Circuit Judge.

Appellee, as Trustee in Bankruptcy of Hartman Corporation of America, brought this action, in seven counts, against appellants (and two others, Charles A. Hartman

and Milton Hartman Corporation, who were voluntarily dismissed from the case by appellee at the beginning of the trial) to recover large sums of money alleged to have been fraudulently paid by the bankrupt to appellants between September 2, 1943 and January 13, 1946.

Counts 2, 3 and 4 of the complaint were voluntarily dismissed by appellee before trial, and Counts 1, 5, 6 and 7 were tried before the Court without a jury. Counts 1 and 5 were decided against appellee, who has not appealed, and those counts need not be further noticed, but the Court found against appellants on Counts 6 and 7 of the complaint and entered judgment accordingly, from which they have appealed.

Introductorily, we observe that Hartman Corporation of America, was created under the laws of Missouri in late August, 1943; that Milton D. Hartman was its president and owned substantially all its stock, but his grandfather, Charles A. Hartman, was its vice-president, and his father, George Hartman, was its secretary and treasurer, and owned five shares of its stock; that Milton and George were two of the three directors of the company, and that on September 1, 1943, the company commenced its original business which was to manufacture airplane engine starters for, and under a contract with, the government.

That on the same day, September 1, 1943, by formal written articles, a partnership was created between Milton, Jane, George, Hazel and Charles Hartman and Pauline Morehead—the latter five being the wife, father, mother, grandfather and grandmother, respectively, of Milton Hartman—for the stated purpose of acting as manufacturers' agents in selling all types of electrical products, under the firm name of American Electrical Products Company, as general partners.

That the Hartman Corporation's very profitable contract with the government came to an end near the close

of 1944, and it, thereafter, engaged in making lawnmowers, battery chargers and steam cleaners, which business proved unprofitable, and on December 2, 1947, by which time it had accumulated known creditors with claims aggregating more than $425,000.00 dollars, a proceeding in reorganization under Chapter 10 of the Bankruptcy Act was instituted in the Federal District Court at St. Louis, but that proceeding proved abortive, partly because the government soon afterward assessed against the corporation a deficiency in income taxes for the years 1943, 1944 and 1945, aggregating, with penalties and interest, the sum of $731,638.59, and, on July 16, 1948, the corporation was adjudged bankrupt, and appellee was elected Trustee, and, pursuant to order of the Referee so directing, he brought this suit.

Count 6 of the complaint charged, in essence, that appellants, as partners doing business as American Electrical Products Company, conspired to and did, between September, 1943 and July, 1944, divert monies of Hartman Corporation to themselves by contracting with Wind King Electric Manufacturing Co. of Merrill, Iowa, for a large number of generators designed for and required by the Hartman Corporation in assembling its airplane engine starters, at a cost of about $62.00 per unit, and reselling them to Hartman Corporation at $135.00 per unit, resulting in a diversion of Hartman Corporation's monies to themselves in the amount of $254,000.00; and by causing Hartman Corporation to purchase various spare generator parts from themselves at prices far in excess of their cost therefor, resulting in diversion of Hartman Corporation's monies to themselves in the further sum of $50,000.00; that the transactions were not at arm's length, and were without consideration, and were fraudulent against the creditors of the bankrupt, particularly under Section 110 (e) (1) of Title 11, U. S. C., and what is now Section 428.020 of the Revised Statutes of Missouri, 1949, and

that the payments were made with intent to hinder, delay and defraud creditors; and that the transactions were in violation of the fiduciary duties and obligations of Milton D. Hartman and George Hartman, as officers and directors of the bankrupt. A joint judgment for recovery of the stated sums, with interest, was accordingly prayed.

Count 7 of the complaint charged, in essence, that on the 2nd day of February, 1945, the Hartman Corporation, at the instance of Milton D. Hartman, was caused to enter into an agreement with appellants, as partners doing business as American Electrical Products Company, whereby appellants agreed to furnish to the Hartman Corporation "such industrial and scientific research as may be reasonably required" for the sum of $5,000.00 per month plus "all costs and expenses reasonably incurred in the performance of the contract"; that the contract was terminated January 31, 1946, but that during the period of its existence the bankrupt was caused to pay $60,000.00 for such alleged services and $44,515.39 as alleged expenses, to American, but that, in fact, no such services were rendered and no such expenses were incurred, by American, and that the payments, aggregating $104,515.39, were without consideration and were fraudulent against the creditors of the bankrupt, particularly under Section 110 (e) (1) of Title 11, U. S. C. and what is now Section 428.020 of the Revised Statutes of Missouri, 1949, and that said monies were caused to be paid to American by the bankrupt with the intent to hinder, delay and defraud its creditors. A joint judgment for recovery of the stated sum with interest was accordingly prayed.

At the trial, appellee put on evidence to sustain the averments of Count 6 of his complaint which was not controverted by any evidence offered by appellants, tending to show that between September 2, 1943 and February 5, 1945, American caused 3,677 generators and a large number of spare parts to be made and shipped by Wind King

to Hartman Corporation, and that American charged to, and was paid by, Hartman Corporation therefor $307,-641.76 more than it paid Wind King for those products, and that American had only a token office of about 100 square feet in the Hartman Corporation plant, and only one employee, a bookkeeper, and that none of these products were ever in its physical possession but were shipped directly by Wind King to Hartman Corporation, and that American did little more than place the orders with Wind King and to invoice, and collect from, Hartman Corporation, and then pay a portion of those proceeds to Wind King in payment of its invoices for the goods, and that, in this way, Hartman Corporation was caused to pay to American $568,974.66 ($496,395.00 for generators and $72,-579.66 for parts) for products for which the partnership paid Wind King $261,332.90 ($243,600.00 for generators and $17,732.90 for parts), resulting in a profit to appellants, partners doing business as American, in the amount of $307,641.76; and that, except for the intervention of American, Hartman Corporation could have purchased these generators and parts directly from Wind King at the identical price which American paid Wind King for them, or for $307,641.76 less than Hartman Corporation actually paid to American for those goods.

Likewise, appellee put on evidence to sustain the averments of Count 7 of his complaint, which was not controverted by any evidence offered by appellants, tending to show that about the time Hartman Corporation ceased making airplane engine starters for the government, and, hence, ceased to have any need for generators and parts, Hartman Corporation was caused, on February 2, 1945, to enter into a contract with American to pay it $5,000.00 per month for "industrial and scientific research" services and all expenses reasonably incurred by American in performance of the contract; that the contract was terminated January 13, 1946, but in the interim Hartman Corporation

made 12 monthly payments of $5,000.00 each to American for purported industrial and scientific research services, plus $49,761.29 as purported expenses, or a total of $109,-761.29, when, in fact, none of the partners of American was either an engineer or a scientist, and they employed no one who was, and they did not have any plant, factory, laboratory, warehouse or shop, and did not render any engineering, scientific, industrial or other kind of service whatever to Hartman Corporation, and, hence, they did not, in fact, incur any expense in performance of the contract, and that the payments, aggregating $109,761.29, made by Hartman Corporation to American were wholly fictitious.

There was also uncontroverted evidence that the partners, doing business as American, received from the partnership, in addition to return of their original capital contributions, the following sums: Milton D. Hartman $113,149.04, Jane I. Hartman $49,383.58, George Hartman $95,133.21, Hazel Hartman $73,114.52, Charles Hartman $66,881.08 and Pauline Morehead $28,076.97, totaling $425,-738.40 and, thus approximating the amount of "profits" made in their dealings with Hartman Corporation.

The only evidence offered by appellants at the trial related to a claimed setoff, which the Court disallowed. The evidence and finding on that point will later be separately discussed.

The Court, in his formal findings of fact, found all the foregoing to be facts, and also found that the files in the Hartman Corporation bankruptcy proceeding, pending in his court, and of which he took judicial notice, disclosed that there were provable claims against the bankrupt in excess of $1,300,000.00 including the claim of the United States "for taxes, and the penalty and interest thereon, for the years 1943, 1944 and 1945, the very period in which the corporation was caused to pay the partnership $417,-

403.05, and was being caused to receive nothing, or virtually nothing, in return."

We have to say, and it is convenient to say now, that, although appellants argue to the contrary, careful analysis of the record discloses that there was, and we find there was, substantial evidence—most of it uncontradicted—to sustain each of the foregoing findings of fact.

But do those findings of the Court support his conclusions and the judgment? The Court concluded (1) that all of the aforesaid payments by the bankrupt to the partners (appellants) were made for the purpose and with the intent to hinder, delay or defraud creditors of the bankrupt, and had that effect, and that those payments were fraudulent and void under Section 428.020 of the Missouri Statutes, and hence are void as to the Trustee under Section 110 (e) (1) of Title 11, U. S. C., and (2) that Milton and George Hartman had breached their fiduciary duty to deal fairly with the bankrupt and not to make a profit for themselves at its expense, and (3) that as directors and officers of Hartman Corporation, they are liable to the Trustee under Section 351.350 of the Missouri Statutes because they caused the bankrupt to pay $307,641.76 more than the fair value of the generators and parts, and $109,761.29 more than the fair value of the alleged industrial and scientific research services and expenses.

Upon these findings and conclusions the Court entered judgment in favor of appellee and against appellants—on Count 6 for $307,641.76 with interest at 6% from December 20, 1948, aggregating $421,629.21, and on Count 7 for $109,761.29 plus interest of 6% from December 20, 1948, aggregating $150,372.97—in the total amount of $572,002.18.

After unsuccessful motions for relief from, and to vacate, the judgment, and for a new trial, appellants have appealed to this Court.

It will be noted at the outset that there is neither evidence nor finding that the bankrupt had a single creditor during the period from September 1, 1943 to January 13, 1946—the period during which the questioned payments were made—unless it can be said that the government's income tax claim, assessed in 1948 "for the years 1943, 1944 and 1945", in the total amount, including penalties and interest, of $731,638.59, gave it the status of a creditor of the bankrupt in those years, because no other claim outstanding against the bankrupt at the time of the bankruptcy antedated May 29, 1946, and appellee concedes "that, so far as the 'transfers' in suit are concerned, these accounts payable would be termed as 'subsequent creditors' "; nor is there any evidence or finding that the bankrupt was insolvent in those years and at the time it made the questioned payments.

Appellants contend that the government's income tax claim assessed in 1948, though as a deficiency for the years 1943, 1944 and 1945, cannot be held to have given it the status of a creditor of the bankrupt in those years, and that hence, there is no evidence that the bankrupt had a single creditor during the period of the questioned payments, and that the burden was upon appellee to show the existence of at least one creditor whose claim was outstanding at the time of the payments and which remained unsatisfied at the time of the adjudication, and that, having failed to do so, appellee did not prove an essential element of his case, and that the evidence and findings do not support the judgment; and they assert, further, that even if it be held that the government's tax claim gave it the status of a creditor of the bankrupt in the years 1943, 1944 and 1945, and therefore during the period of the questioned payments, there is no evidence or finding that the bankrupt was insolvent at the time of those payments, or was rendered insolvent by those payments, and that, again, appellee has failed to prove an

essential element of his case, and that the evidence and findings do not support the judgment.

Section 110 (e) (1), Title 11, U. S. C., provides:

> "A transfer made or suffered or obligation incurred by a debtor adjudged a bankrupt under this title which, under any Federal or state law applicable thereto, is fraudulent as against or voidable for any reason by any creditor of the debtor, having a provable claim under this title, shall be null and void as against the Trustee of such debtor."

Section 428.020 of the Missouri Statutes, 1949, provides in essence, that:

> "Every conveyance * * * of any estate or interest in lands, or in goods and chattels, or in things in action, * * * made or contrived with the intent to hinder, delay or defraud creditors of their lawful * * * debts or demands * * * shall be from henceforth deemed and taken, as against said creditors * * *, prior and subsequent, to be clearly and utterly void."

Though this statute was enacted in substantially the same terms October 1, 1804, 1 Terr. Laws, p. 19, Sec. 19, and has ever since continued as a statute of Missouri, it has since been many times held by the courts of Missouri that a transfer, though made voluntarily and without consideration, is not fraudulent or void against creditors if the transferor, at the time of the transfer, had no creditors. The Supreme Court of Missouri collected the cases and treated exhaustively with this question in the case of **Coleman v. Hagey**, 252 Mo. 102, 158 S. W. 829, and held, upon the support of many cited cases, that the assets of a corporation, while it is solvent, are not impressed with any trust for present or future creditors, and that (p. 136): "While solvent and a going concern it holds its property like a natural person, free from the touch of general creditors, and that it may dispose of same as the judgment or wisdom of its management dictates, subject

only to the provisions of its charter and those other restraints upon the conveyance of property which the law imposes as well upon individuals as upon corporations. This court and our courts of appeals have repeatedly recognized the correctness of this modern doctrine, and the reasoning in support of same will be found upon reference to the Missouri cases here cited, thus avoiding lengthy quotations from same" (citing many Missouri cases). With this fortification, the Court got down to the precise question here, saying (p. 133):

> "A trustee in bankruptcy in prosecuting a suit to judgment must prove the facts essential under the state law, since to hold otherwise would be but to decide that he could recover without proof of his right to do so (**Miller v. Acid & Fertil Co.**, 211 U. S. 496, 21 Am. Bk. R. 416); and in a proceeding to set aside a conveyance or divest title, it is necessary to prove that the claim upon which the suit is based, existed prior to the time of the conveyance. (**Stone v. Myers**, 9 Minn. 303). It is no concern of the trustee's what the defendants may have done or did with their property prior to the time claimants became creditors; as to them, defendants may have given away their property or conveyed it away (with no matter what purpose) and only those creditors who became such before the fraudulent conveyance, have a right to complain, hence the necessity of showing the existence of the claim prior to the conveyance. (**Bloom v. Moy**, 43 Minn. 397.)"

In accord are the more recent cases of **Riggs v. Price**, 277 Mo. 333, 210 S. W. 420; **Dickey v. Thompson**, 323 Mo. 107, 18 S. W. 2d 388.

We think it is clear, under the Missouri law, that if the bankrupt had no creditors at the time of the questioned payments, those payments cannot be held to have been made in fraud of creditors—certainly not when the com-

plainant has not produced evidence showing that the bankrupt, at the time of those payments, was insolvent, or was rendered so by those payments, **and** "harbored the fraudulent intent to become indebted and to secrete his property as against future creditors." **Stierline v. Teschmacher,** 333 Mo. 1208, 1222, 64 S. W. 2d 647, 654.

The resulting and threshold question then is: Was the government, because of its income tax claim assessed in 1948 as a deficiency for the years 1943, 1944 and 1945, a creditor of the bankrupt in those years? We believe it was (beginning at July 15, 1944), and that its claim constitutes a debt provable in bankruptcy. We believe this because, by the terms of the Internal Revenue Code income tax **liability** matures on the day the return is required to be filed, and the **correct amount** of the tax liability becomes **due** at that time, regardless of when the deficiency assessment may be made (Sec. 6151, 195 Code; Vol. 4, C. C. H., 1956, para. 5231, p. 44078, et seq.). Such was also the prior law. And by the regulations "Interest at the rate of 6% per annum shall be paid on any unpaid amount of tax from the last date prescribed for payment of the tax (determined without regard to any extension of time for payment) to the date on which payment is received" (Regs. 301.6601-1; para. 5507, C. C. H., 1956), and limitations run from the date the correct amount of tax should have been paid, and not from the date of the assessment [Sec. 6501, 1954 Code; Regs. 301.6501 (a-1)], and a deficiency "is the difference between the amount of tax, if any, which is paid on the due date, and the correct liability for any taxable year" (Para. 5316.01, C. C. H., 1956).

This Court has several times held that a subsequently levied tax constitutes a claim as of the time it matured under the law, and must be considered in determining the question of solvency of the taxpayer at that time. **Scott v. Commissioner,** 8 Cir., 117 F. 2d 36, 38; **United States v.**

**Armstrong**, 8 Cir., 26 F. 2d 227; **Updike v. United States**, 8 Cir., 8 F. 2d 913. See also **Commissioner v. Keller**, 7 Cir., 59 F. 2d 499, and **United States v. Seyler**, D. C., W. D. Pa., 142 F. Sup. 408, 410.

On the basis of these authorities we hold that the government's tax claim for the year 1943 became a liability of the bankrupt on July 15, 1944, the date when the return for that year was required to be filed, and that its tax claim for the year 1944 became a liability on July 15, 1945, and that its tax claim for 1945 became a liability on July 15, 1946, and we hold that these claims, as they so matured, constituted provable debts in bankruptcy, **Ingles v. Boetler**, 9 Cir., 100 F. 2d 915, 918; **In Re Mercury Engineering**, D. C., S. D. Cal., 68 F. Sup. 376, 382; Sec. 797, **Remington on Bankruptcy**, 4th Ed.

But this does not eliminate the difficulty. While it considerably simplifies the issue under Count 7, it only starts the chain of complexities affecting the issues under Count 6, because, though the government became a creditor of the bankrupt, in respect of its tax claim for the year 1943, on July 15, 1944, it was not a creditor during that portion of the time when the payments, questioned in Count 6, were being made from September 1, 1943 to July 15, 1944, and as respects those payments, the government is, at most, a subsequent creditor; and it is not shown in the evidence nor found by the Court how much of the money, that is embraced in the judgment on Count 6, was paid by the bankrupt to appellants in that period and how much was paid afterward. The evidence and findings, pertaining to Count 6, show only the total amount paid by the bankrupt to appellants in the whole period from September 1, 1943 to February 5, 1945. Yet the judgment on Count 6 includes the amounts paid by the bankrupt to petitioners in the whole period of from September 1, 1943 to February 5, 1945, and, hence, includes the payments made before the government became a creditor on July 15,

1944, and there is no way in the world for us or for anyone else to tell from this record how much of the questioned payments, embraced in the judgment on Count 6, was paid by the bankrupt to appellants before the government became a creditor.

It is therefore clear that appellee failed to adduce proof sufficient to support the judgment on Count 6, unless some presumption comes to his aid in the circumstances. He contends precisely so—that a presumption did come to his aid and that it filled the gaps in his evidence, under the circumstances shown. He says that when he put on evidence showing that the payments were voluntarily made, without consideration, the law of Missouri created a presumption that the payments were fraudulent not only as to existing creditors, but as to subsequent creditors as well, and that he, thus, with the aid of that presumption, made a prima facie case, and that the burden of going forward with the evidence to explain and show otherwise—even that the bankrupt was solvent at the time of the payments, and was not rendered insolvent by them and was not at the time harboring a fraudulent intent to become indebted and to secrete its property from the reach of future creditors—passed to and rested upon appellants, and that they failed to adduce any evidence in discharge of that burden and that the presumption of fraud thus stands.

It is true that many Missouri cases hold that a voluntary conveyance without consideration is presumed to be fraudulent, **as to existing creditors**, and, when such is shown, plaintiff makes a prima facie case, and the burden of going forward with the evidence to show that the conveyance was not fraudulent—including the fact that the grantor was not insolvent at the time of the conveyance, nor rendered so by it—passes to and rests upon the party who received the conveyance, **Patten v. Casey**, 57 Mo. 118; **Walsh v. Ketchum**, 84 Mo. 427; **Snyder v. Free**, 114 Mo.

360, 369, 21 S. W. 847; **Hoffman v. Nolte**, 127 Mo. 120, 135, 29 S. W. 1006; **Clark v. Thias**, 173 Mo. 628, 652, 73 S. W. 616; **May v. Gibler**, 319 Mo. 672, 4 S. W. 2d 769; **Dickey v. Thompson**, 323 Mo. 107, 108, 18 S. W. 2d 388; **Bank v. Thornburrow & Stone**, 109 Mo. App. 639, 643, 83 S. W. 771; **Updegraff v. Theaker**, 57 Mo. App. 45, 47; **Gillson v. Carroll**, 231 Mo. App. 395, 397, 97 S. W. 2d 146. This Court, too, so held, in a Missouri appeal, in **Commerce Trust Co. v. Woodbury**, 8 Cir., 77 F. 2d 478, 488, 489.

But, as stated and emphasized, this presumption arises, and this shift in the burden of going forward with the evidence occurs, only as respects creditors whose claims were in existence at the time of the transfer. The presumption does not arise, and the shift in the burden of going forward with the evidence does not occur, as respects "subsequent creditors." This is definitely held by the Supreme Court of Missouri in **Coleman v. Hagey**, 252 Mo. 102, 145, 158 S. W. 829, in this language:

> "The Trustee represents in this proceeding only subsequent creditors, i. e., those who extended credit to the corporation or whose claims were created against it long after the transaction by defendants of which plaintiff complains. As a general rule subsequent creditors cannot attack a transfer unless they can show that the fraudulent intent was intended toward them; or as is held by the Supreme Court of Alabama, 'A subsequent creditor of a corporation cannot complain of the conveyance or transfer of the corporate property, unless such conveyance or transfer was made with the intent to hinder, delay and defraud subsequent creditors, and had such operation and effect; and in such case the burden is on the subsequent creditor seeking the relief to allege and prove such fraud' (**Wilson v. Stevens**, 129 Ala. 630). There is nothing in the case, under consideration, to relieve the trustee who represents the creditors from the requirements of the rule stated."

Again, in **May v. Gibler**, 319 Mo. 672, 678, 4 S. W. 2d 769, the Supreme Court of Missouri said:

> "• • • We have held in a long line of cases that proof of fraud as to existing creditors does not necessarily render a deed void as to subsequent creditors and that actual fraud as to them must be pleaded and proved. **Coleman v. Hagey**, 252 Mo. 102, 158 S. W. 829; **Johnson v. Murphy**, 180 Mo. 597, 79 S. W. 909; **Davidson v. Dockery**, 179 Mo. 687, 78 S. W. 624."

To the same effect is **Stierlin v. Teschmacher**, 333 Mo. 1208, 1222, 64 S. W. 2d 647, 654. This is a well-settled rule in Missouri.

The government's earliest tax claim, the one for the year 1943, did not accrue until July 15, 1944, and the government was, hence, a subsequent creditor as respects the payments made between September 1, 1943, and July 15, 1944, and, under the Missouri law, the burden of proving that the payments made by the bankrupt to appellants, in that period, were fraudulent against subsequent creditors was upon appellee, and inasmuch as he has failed to show that the bankrupt was insolvent at the time those payments were made, or that they rendered it insolvent, and that when those payments were made "the debtor harbored the fraudulent intent to become indebted and to secrete his property as against future creditors" (**Stierlin** case, p. 1222), it follows that appellee has failed to sustain the burden which the law cast upon him of showing that the payments, made in the period mentioned, were fraudulent as to subsequent creditors.

As to appellee's further claim, in support of his judgment on Count 6, that appellants Milton and George Hartman, as officers and directors of the bankrupt, breached their fiduciary duties to deal fairly with it and not to make a profit for themselves at its expense, it is sufficient to say, on the basis of **Coleman v. Hagey**, supra, and other like Missouri cases cited, that inasmuch as the bankrupt is not

shown to have had any creditors in the period from September 1, 1943, to July 15, 1944, Milton and George Hartman, who owned the bankrupt company, were, in that period, free to do with its assets as they liked and "it is no concern of the trustee's what the defendants may have done or did with their property prior to the time claimant (the government here) became a creditor," **Coleman** case, p. 133, and, as earlier stated, it is impossible to tell from this record what part of the payments, embraced in the judgment on Count 6, were made by the bankrupt to appellants before the government became a creditor on July 15, 1944, and what part was paid afterwards.

As to appellee's still further claim, in support of his judgment on Count 6, that Milton and George Hartman, as directors and officers of the bankrupt, knowingly purchased for the bankrupt the generators and parts involved in Count 6 and caused it to pay therefor more than the fair value thereof to the bankrupt and thus became "* * * jointly and severally liable for the debts of the corporation to an amount equal to the difference between the purchase price of said property bought and such fair value thereof * * *" under Section 351.350 of the Missouri Statutes, 1949—from which the quoted language is taken—it is sufficient to say that we believe the phrase "liable for the debts of the corporation", as used in the statute, means debts of the corporation existing at the time of such purchases; and there is no showing that there were any "debts of the corporation" prior to the accrual of the government's 1943 tax claim on July 15, 1944, and there is no showing as to how much of the "purchases" accrued before, and how much after, that date.

For all the foregoing reasons, we are clear that, as respects Count 6, appellee has failed to prove the abovementioned essential elements of his case, and that neither the evidence nor the findings sustain the judgment rendered on that Count, and it follows that the judgment on

Count 6 must be reversed, and that Count must be remanded for a new trial.

But upon Count 7 we have exactly the converse. Upon that count it appears, and has been found by the trial court, that, after the date upon which we have held the government first became a creditor of the bankrupt—July 15, 1944—, the bankrupt, between the dates of February 2, 1945 and January 13, 1946, paid to appellants, without consideration, and with intent to hinder, delay or defraud creditors, the sum of $109,761.29. When those payments were made the government was, as stated, an existing creditor, as respects its tax claim for 1943, and, under the Missouri cases earlier cited, when appellee put on evidence, as he did, tending to show that the payments complained of in Count 7 were voluntarily made without consideration, the presumption of fraudulence of those payments, as against the existing creditor—whose claim remains unpaid—came to his aid and, with that presumption, he made a prima facie case, and the burden of going forward with the evidence—to explain that the bankrupt was not insolvent when the payments assailed in Count 7 were made, and that those payments did not render it insolvent, and that those payments were not intended to and did not operate to hinder, delay or defraud the existing creditor (the government—upon its income tax claim for the year 1943, that matured July 15, 1944)—passed to and developed upon appellants, and inasmuch as they offered no evidence to rebut the prima facie case thus made by appellee with the aid of the presumption mentioned, it follows that the presumption of fraudulence stands, and that, with it, there was evidentiary support for the finding of the trial court that those payments were made for the purpose and with the intent to hinder, delay or defraud creditors of the bankrupt, and that finding supports the judgment on Count 7, and, therefore, the judgment upon Count 7 must be affirmed.

Appellants set up in their answer that, after the bankrupt became financially embarrassed in 1947, they paid the sum of $206,796.66 from their own funds to Mississippi Valley Trust Company in reduction of the bankrupt's indebtedness to that bank, and they claimed, in consequence, an offset in that amount against any claims that the trustee might be able to establish against them in this suit.

We have traced these setoff transactions with care and are satisfied that there was no merit in these claims of offset, as the trial court held, because at the time those payments were made by appellants a number of appellants, and various corporations which they owned, had overdrawn their accounts with, and were indebted to, the bankrupt company in large amounts, and, upon appellants' own direction and action, as the trial court found, they received credit to their accounts on the books of the bankrupt company for all sums which they paid to the bank on the indebtedness of the bankrupt, and thus they simply paid and extinguished their overdrafts or debts to the bankrupt company, and, hence, the bankrupt owes them nothing.

It follows that the judgment upon Count 7 must be, and it is hereby, affirmed, but the judgment upon Count 6 must be, and it is hereby, reversed, and the cause, as to Count 6, is remanded for a new trial.

Affirmed as to Count 7.

Reversed and remanded as to Count 6.

~~A true copy.~~

~~Attest:~~

~~Clerk, U. S. Court of Appeals, Eighth Circuit~~

**(Judgment.)**

United States Court of Appeals for the
Eighth Circuit.

No. 15465—September Term, 1956.

Milton D. Hartman, George Hartman, Jane I. Hartman, Hazel K. Hartman and Milton D. Hartman, as Executor of the Will of Pauline Morehead,
Appellants,

vs.

Fred J. Lauchli, Trustee of Hartman Corporation of America.

Appeal from the United States District Court for the Eastern District of Missouri.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Missouri, and was argued by counsel.

On Consideration Whereof, It is now here Ordered and adjudged by this Court that the judgment of the said District Court in this cause upon Count 7 of the complaint be, and hereby is affirmed, and as to Count 6 of the complaint the judgment be, and hereby is reversed and the cause remanded for a new trial.

It has been ordered by this Court that the total of the costs taxed or taxable in this Court be assessed and taxed one-half to appellants and one-half to appellee. The appellants having paid the Clerk's docketing fee of $25.00 and the taxable amount of $1926.22 for printing their record, a total of $1951.22, and the appellee having paid the taxable amount of $178.09 for printing his supplemental record, making a total of $2129.31, the appellants are to

pay one-half of this amount or $1064.66, and the appellee one-half or $1064.65. It is therefore now here Ordered that the appellants, Milton D. Hartman, George Hartman, Jane I. Hartman, Hazel K. Hartman, and Milton D. Hartman, as Executor of the Estate of Pauline Morehead, have and recover from the appellee, Fred J. Lauchli, Trustee of Hartman Corporation of America, the sum of Eight Hundred Eighty-six and 56/100 ($886.56) Dollars, being the difference between the amount taxable against the appellee and the amount paid, to be paid by said Trustee out of any funds belonging to said Estate.

November 20, 1956.

## OPINION AND JUDGMENT (ON REHEARING).

United States Court of Appeals
For the Eighth Circuit.

No. 15,465

Milton D. Hartman, George Hartman, Jane I. Hartman, Hazel K. Hartman, and Milton D. Hartman, as Executor of the Estate of Pauline Morehead, Appellants,

vs.

Fred J. Lauchli, Trustee of Hartman Corporation of America, Appellee.

Appeal from the United States District Court for the Eastern District of Missouri.

[January 4, 1957.]

William J. Becker for Appellants.

Cobbs, Armstrong, Teasdale & Roos, and Charles E. Dapron for Appellee.

On Rehearing.

Before Johnsen, Van Oosterhout and Whittaker, Circuit Judges.

Whittaker, Circuit Judge.

Appellants have moved for a rehearing, and for leave to file exhibits in support of their motion for rehearing, and

appellee has filed a petition for modification of our opinion, or for rehearing as to Count VI.

Appellants' motion for leave to file proffered exhibits (consisting merely of documents which would have been entitled to be noticed by the District Court) in support of their motion for rehearing is granted, and said exhibits are ordered filed.

Appellants' motion for rehearing is based on the contention that the statements in our opinion, saying that the Government's deficiency income tax claim against The Hartman Corporation for the years 1943, 1944 and 1945 had been "assessed", in 1948, is not supported by the Record. While the District Court did not, in his findings, use the word "assessed", he did find that those claims had been filed in The Hartman Company bankruptcy proceeding, pending before him and of which he took judicial knowledge, and that they were both "provable claims" and "priority claims", which strongly impled that they had been "assessed"; and, moreover, the first exhibit, filed here by appellants in support of their present motion for rehearing, confirms this finding by expressly and repeatedly saying that those claims had been so "assessed" by the Treasury Department. Appellants' motion is therefore without merit and is denied.

But it does appear, quite conclusively, from the exhibits filed by appellants in support of their motion for rehearing, that The Hartman Corporation was, in the years in question, on a fiscal year accounting and tax reporting basis, and that its fiscal year ended April 30, instead of on a calendar basis, as we inferred from the District Court's finding that these taxes were "for the years 1943, 1944 and 1945", and, therefore, its income tax return for the fiscal year ended April 30, 1944 was not required to be filed, and the correct amount of tax did not become due,

under Section 56 (a) of the Internal Revenue Code of 1939 [Section 56 (a), Title 26, U. S. C.], until July 15, 1944, and, to correct that error, we hereby modify our opinion by substituting "July 15" for "March 15" wherever used in our opinion.

We have considered appellee's petition for modification of our opinion or for rehearing as to Count VI, and are of the opinion that it, in the circumstances and condition of this Record, is without merit and should be, and it is hereby, denied.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

United States Court of Appeals
For the Eighth Circuit.

No. 15465—September Term, 1956.

| | |
|---|---|
| Milton D. Hartman et al., Appellants, vs. Fred J. Lauchli, Trustee of Hartman Corporation of America. | Appeal from the United States District Court for the Eastern District of Missouri. |

There has been filed and considered by the Court in this cause motion of appellants for a rehearing and for leave to file exhibits in support thereof, and a petition by appellee for modification of the opinion of this Court, or for rehearing as to Count VI.

Appellants' motion for leave to file proferred exhibits (consisting merely of documents which would have been entitled to be noticed by the District Court) in support of their motion for rehearing is by the Court hereby granted, the exhibits are ordered filed and the opinion of this Court is modified by substituting "July 15" for "March 15" wherever used in the opinion.

It is further Ordered that appellants' motion for rehearing be, and is by the Court hereby, denied.

And it is further Ordered that appellee's petition for modification of the opinion, or for rehearing as to Count VI, is without merit and should be, and it is hereby, denied.

January 4, 1957.

## STATUTES, FEDERAL RULES, STATE LAWS AND FEDERAL REGULATIONS INVOLVED.

Section 110 (a) (1), Title 11, U. S. C.:

"A transfer made or suffered or obligation incurred by a debtor adjudged a bankrupt under this title which, under any Federal or state law applicable thereto, is fraudulent as against or voidable for any reason by any creditor of the debtor, having a provable claim under this title, shall be null and void as against the Trustee of such debtor."

Section 428.020 of the Missouri Statutes, 1949:

"Every conveyance * * * of any estate or interest in lands, or in goods and chattels, or in things in action * * * made or contrived with the intent to hinder, delay or defraud creditors of their lawful * * * debts or demands * * * shall be from henceforth deemed and taken, as against said creditors * * *, prior and subsequent, to be clearly and utterly void."

Section 351.350 of the Missouri Statutes, 1949:

"If the officers and directors of any corporation shall knowingly purchase for the corporation, of which they are officers or directors, any property, real or personal, and pay therefor more than the **fair value thereof** to the purchasing coporation, they shall be jointly and severally liable for the debts of the corporation to an amount equal to **the difference between the purchase price of said property bought and such fair value thereof**; provided, that if any of the officers or directors be absent at the time of making such purchase, or shall object thereto, and shall file their objection in writing, with the secretary or other officer of the corporation having charge of the books, they shall be exempted from the liability."

Rule 18 of the Federal Rules of Civil Procedure:

"Joinder of claims and remedies. (a) Joinder of claims. The plaintiff in his complaint or in a reply setting forth a counterclaim and the defendant in an answer setting forth a counterclaim may join either as independent or as alternate claims as many claims either legal or equitable or both as he may have against an opposing party. There may be a like joinder of claims when there are multiple parties if the requirements of Rules 19, 20 and 22 are satisfied. There may be a like joinder of cross-claims or third-party claims if the requirements of Rules 13 and 14 respectively are satisfied.

"(b) Joinder of Remedies; Fraudulent Conveyances. Whenever a claim is one heretofore cognizable only after another claim has been prosecuted to a conclusion, the two claims may be joined in a single action; but the court shall grant relief in that action only in accordance with the relative substantive rights of the parties. In particular a plaintiff may state a claim for money and a claim to have set aside a conveyance fraudulent as to him without first having obtained a judgment establishing the claim for money."

Chapter 70 b, Int. Rev. Code, 26 U. S. C. A., Sections 6871 and 6872:

"6871. Claims for income, estate and gift taxes in Bankruptcy and receivership proceedings.

"(a) Immediate assessment.—Upon the adjudication of bankruptcy of any taxpayer in any liquidating proceeding, the approval of a petition or, or against, any taxpayer in any other bankruptcy proceeding, or the appointment of a receiver for any taxpayer in any receivership proceeding before any court of the United States or of any State or territory or of the District of Columbia, any deficiency (together with all interest, additional amounts, or addi-

tions to the tax provided by law) determined by the Secretary or his delegate in respect of a tax imposed by subtitle A (sub-section 1-1552 of this Title) or B (§§ 2001-2524 of this title) upon such taxpayer **shall**, despite the restrictions imposed by section 6213 (a) upon assessments, **be immediately assessed** if such deficiency has not been theretofore assessed in accordance with law.

"(b) Claim filed despite pendency of Tax Court Proceedings.—In the case of a tax imposed by subtitle A (§§ 1-1552 of this Title) or B (§§ 2001-2524 of this title) **claims for the deficiency** and such interest, additional amounts, and additions to the tax **may be presented, for adjudication** in accordance with law, **to the court before which the bankruptcy** or receivership **proceeding is pending**, despite the pendency of proceedings for the redetermination of the deficiency in pursuance of a petition to the Tax Court; but no petition for any such redetermination shall be filed with the Tax Court after the adjudication of bankruptcy, approval of the petition in any other bankruptcy proceedings, or the appointment of the receiver (Aug. 16, 1954, C. 736, 68A Stat. 838).

"6872. Suspension of Period on Assessment.

"If the regulations issued pursuant to section 6036 require the giving of notice by any fiduciary in any proceeding under the Bankruptcy Act (11 sec. 1 et seq.), or by a receiver in any other court proceeding, to the secretary or his delegate of his qualification as such, the running of the period of limitations on the making of assessments shall be suspended for the period from the date of the institution of the proceeding to a date 30 days after the date upon which the notice from the receiver or other fiduciary is received by the Secretary or his delegate; **but the suspension under this sentence shall in no case be for a period in excess of 2 years** (Aug. 16, 1954, c. 736, 68A Stat. 838)."

Title 11, Sec. 1 (11), U. S. C. A.:

"Section 1. Meaning of words and phrases. The words and phrases used in this Act and in proceedings pursuant hereto shall, unless the same be inconsistent with the context, be construed as follows:

* * * * * * * *

"(11) 'Creditor' shall include anyone who owns a debt, demand or claim **provable in bankruptcy**, and may include his duly authorized agent, attorney, or proxy."

Title 11, Sec. 104a (5), U. S. C. A.:

"Debts which have priority—a. The debts to have priority, in advance of the payment of dividends to creditors, and to be paid in full out of bankrupt estates, and the order of payments shall be * * * (4) taxes legally due and owing by the bankrupt to the United States or any State or any subdivision thereof: * * * And provided further, That, in case any question arises as to the amount or legality of any taxes, **such question shall be heard and determined by the Court.**"

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IN THE

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1956.

No. 878.

MILTON D. HARTMAN, GEORGE HARTMAN, JANE I. HARTMAN, HAZEL K. HARTMAN and MILTON D. HARTMAN, as Executor of the Will of Pauline Morehead, Deceased,
Petitioners,

vs.

FRED J. LAUCHLI, Trustee in Bankruptcy of the Hartman Corporation of America, a Corporation,
Respondent.

## BRIEF

**In Opposition to Petition for Writ of Certiorari.**

### STATEMENT OF THE CASE.

**Introductory.** Counts VI and VII of the Complaint of Respondent (Plaintiff below) are claims by the Trustee in Bankruptcy of Hartman Corporation of America to recover certain monies and assets fraudulently caused to have been transferred from the bankrupt corporation (R. 6-9), in violation of Section 70e (1) of the Bankruptcy Act [11 U. S. C. A., § 110e (1)] and § 428.020 of the Missouri Statutes (M. R. S. '49). Each of these Counts deal with certain

transactions between the Corporation and American Electrical Products Company, a "family" partnership, occurring during the period September, 1943, to March 15, 1946. The partnership was created by, and consisted of, Petitioners (Defendants below) (R. 79, 270), to-wit: Jane Hartman, George Hartman, Hazel Hartman, Charles Hartman, Pauline Morehead and Milton Hartman. The five persons first named are, respectively, the wife, father, mother, grandfather and grandmother of Milton Hartman (R. 4, 5; R. 13, 270).

Each is also a stockholder of Hartman Corporation of America (R. 269).

Count V concerns profits derived from the alleged "sale" by the partnership of certain generators and parts to the Corporation; Count VII, monies which the Corporation was caused to pay the partnership under a certain contract for alleged scientific research and engineering services.

**Hartman Corporation.** Hartman Corporation of America, a Missouri corporation, was incorporated in 1943 (S. R. 39). Throughout the entire period of its existence the defendant, Milton Hartman, was an officer (President), director and majority stockholder (R. 4, 5, 11, 268). Another of the defendants, George Hartman, was Secretary-Treasurer and a member of the Board of Directors (R. 268).

On December 2, 1948, Chapter X (U. S. C., Tit. 11, Chap. X), proceedings were instituted against Hartman Corporation of America (R. 342, 413; S. R. 43). Thereafter, on or about July 16, 1948, the trial court below entered its order adjudging the Corporation a bankrupt (R. 4, 227, 13). Respondent was appointed Trustee in Bankruptcy on August 9, 1948 (R. 77).

**American Electrical Products Company.** The Partnership Agreement (Def. Ex. O; R. 333), executed by each of the Petitioners, is dated September 1, 1943. From early

1944 on (R. 210) the partnership occupied an area 10′ x 10′ (office space for Mr. Alonzo Abell, the partnership's bookkeeper) in the premises of Hartman Corporation of America; Mr. Abell was stationed directly behind the office of the Corporation's President, Milton Hartman (R. 228).

The Hartman partnership **had no facilities whatever** other than the above office space (R. 50, 228, 271). Nor, excepting for its dealings with Hartman Corporation, was it engaged in any business (R. 229, 49, 96).

The only full-time employee of the partnership was Alonzo Abell, the bookkeeper (R. 270). He kept the books and records of the partnership throughout the entire period of its existence (R. 78, 79, 204). In pre-trial conference, defendants advised that all of the books and records of the partnership had disappeared and couldn't be found (R. 79).

During the 2½ year period covered by Counts VI and VII, the family drew the following amounts out of the partnership over and above their alleged capital contributions (R. 80; S. R. 2): Milton Hartman, $113,149.04 (S. R. 3); George Hartman, $95,133.12; Charles Hartman, $66,881.08; Hazel Hartman, $73,114.52; Jane Hartman, $49,383.58 and Pauline Morehead, $28,076.97 (S. R. 3).

The total of these withdrawals, $425,738.40, closely approximates the total profits which the trial court found to have been exacted improperly from the Corporation under Count VI ($307,641.76) and Count VII ($109,761.29) (R. 51).

Defendants efforts to explain the partnership's profitable business operations were informative. Jane Hartman couldn't remember whether or not the partnership had a factory—but felt that it had to have (S. R. 33; R. 262). But she couldn't remember where it was (R. 262). Neither she nor Charles could state in what, if any, business American Electrical was engaged (R. 262; S. R. 9).

Defendants rendered little, if any, services to the partnership. For short periods of time several days a week, during the first few months of the partnership's existence, Jane and Hazel Hartman would occasionally answer the 'phone (S. R. 11, 34, 32, 31). This was the extent of their services to the partnership (S. R. 11, 31). And the extent of the partnership's "activity" during the periods of time in which these services were rendered (S. R. 34).

Charles Hartman never performed any duties, or rendered any services whatsoever for the partnership (S. R. 9).

George Hartman was "full time on the payroll of Hartman Corporation" during the life of the partnership (R. 34), but would put in "maybe an hour or so" at American Electrical "maybe every other day" over a period of thirty or sixty days (S. R. 17). This was all the time he devoted to American Electrical and constituted all of the services that he rendered (S. R. 17).

The Record does not disclose what services, if any, Milton Hartman performed on behalf of the partnership. But it does disclose that during this period Milton spent his full time in the management of Hartman Corporation (R. 34), receiving as salary therefor approximately $22,000 a year (R. 44); accordingly, any time which he devoted to partnership "business" must have been negligible.

**Count VI, Generators and Parts Sales.** During a period of time commencing concurrently with the formation of the family partnership and ending February 5, 1945, the family partnership purchased 3677 generators from Wind-King Electric Manufacturing Company, Merrill, Iowa (R. 168-173) for a total cost of $243,600 and sold those same generators to the Corporation for a total price of $496,395 (R. 96, 116)—**a profit of $252,795** (R. 49, 122, 80, 81, 168-169, 171).

The cost to American Electrical of $243,600 included a $23 material allowance per each generator (R. 168-169, 171). This covered the total cost to the partnership of material for each generator (R. 203, 201-202; S. R. 5).

During this same period of time the partnership also purchased certain "parts" from Wind-King for $17,732.90 (R. 171-173, 203, 216) and immediately resold those identical parts to the Corporation for $72,579.66—an additional profit of **$54,856.76** (R. 173, 217).

The Trustee in Bankruptcy, Respondent herein, sought recovery of these profits under Count VI.

The above sales—and resulting profits—were shown by uncontroverted evidence, from the following sources:

(1) the invoices from the partnership to the Corporation, all of which had been prepared by Mr. Abell (R. 77, 96; S. R. 3);

(2) Correspondence and invoice from Wind-King to the partnership (Pl. Ex. 15; R. 82, 83-95, 116);

(3) Mr. Abell's schedule of invoices from Wind-King to American Electrical, and of the corresponding invoices from American Electrical to Hartman Corporation, covering the identical generators and parts (Pl. Ex. 16, R. 99-115, 96-98, 204; S. R. 5). The matters disclosed upon this Exhibit were further confirmed by identification of the corresponding account on the Hartman Corporation books—and by comparison with the partnership's invoices to the Corporation (R. 215);

(4) Photostatic copies of the original ledger sheet records of Wind-King Electric Manufacturing Company covering its sales transactions with American Electrical (Pl. Ex. 20; R. 125-167, 122-123, 207);

(5) Testimony of Mr. Theodore G. Senn, a former bookkeeper of Hartman Corporation (R. 168-169),

Mr. Edmund F. J. Meyer, a Certified Public Accountant, who had worked upon the Hartman Corporation books (R. 215, 216; S. R. 8) and Mr. Abell (R. 82, 96, 116, 203).

Milton Hartman himself admitted that the foregoing "profits" would have gone **to Hartman Corporation** had the deal been made directly between Wind-King and the Corporation (S. R. 36-37).

Neither any of the generators nor any of the parts **ever passed through the hands of the partnership** (R. 97, 203). Each item was shipped by Wind-King **directly to Hartman Corporation** (R. 97, 203). The partnership neither repacked, processed or gave any other treatment to these items; defendants rendered **no service whatsoever in connection with the delivery of these items to Hartman Corporation** (R. 98). Wind-King shipped the items directly to Hartman Corporation and invoiced the partnership; the partnership, in turn, through Mr. Abell, then immediately rendered a partnership invoice covering the same items, to Hartman Corporation (R. 98, 203).

**Count VII, the Scientific Research Contract.** Under Count VII the Trustee sought to recover from defendants the sum of $109,761.29, which moneys the Corporation had been caused to pay the family partnership for alleged scientific and industrial research services (R. 8-9).

These payments had been made on the basis of a certain contract between the Corporation and the family partnership (Pl. Ex. 17, R. 116, 117-118) dated February 2, 1945—the approximate time that the generators and parts sales were dwindling to an end (R. 96, 122).

After reciting that the partnership had theretofore, and was then, engaged in industrial and scientific research, this "agreement" provided that the partnership would furnish the Corporation such "industrial and scientific re-

search as may reasonably be required by" the Corporation (R. 117). In return, the Corporation agreed to pay the partnership $5,000 a month for those services, and, in addition, to reimburse the partnership for any expenses incurred in the furnishing thereof (R. 118).

The Corporation, under this Agreement, paid the partnership a total of $109,761.29, $60,000 of which represented fees ($5,000/month for 12 months), and $49,760.29, "expenses" (R. 173).

This was proven by the following:

(1) the partnership invoices—prepared by Mr. Abell (R. 200)—and delivered to the Corporation (Pl. Ex. 21, R. 175-199), covering period 4-30-45 (R. 175) to 1-31-46 (R. 193);

(2) the nineteen Hartman Corporation checks which paid all of these invoices (Pl. Ex. 18, S. R. 4; R. 119);

(3) Mr. Abell's Schedule of the foregoing partnership invoices (R. 209) sent to the Corporation under this contract and of the corresponding payments made on such invoices by the Corporation (Pl. Ex. 19, R. 121; S. R. 4). This also reflects that the final payment made by Hartman Corporation under this contract **was March 15, 1946;**

(4) the testimony of Mr. Senn, who helped to keep the books and records of Hartman Corporation (R. 78, 220-221) and of Mr. Abell (R. 119, 209, 173, 200; S. R. 4);

(5) Milton Hartman himself conceded that these monies had been paid by the Corporation to the partnership during the above period (R. 273-275; S. R. 37).

No one upon the partnership payroll was either an engineer or a scientist (R. 273). Nor was Jane or Hazel (R. 273). Nor Milton—nor any other member of the partnership (R. 202).

During the period of this contract, the partnership didn't have a plant. Or a factory. Or a laboratory. Or even a shipping room (R. 214, 228). It merely had 10′ x 10′ office space for Mr. Abell in the Hartman Corporation premises (R. 214, 228).

Mr. Abell was not aware of any services having to do with industrial and scientific research which were rendered to Hartman Corporation (R. 202). To his knowledge, no such services were ever rendered (R. 212).

Messrs. Senn (R. 358) and Casey (R. 229), also employed by Hartman Corporation during this period (R. 227), testified to the same effect.

Nor were there ever any supporting data, vouchers, etc., to substantiate the items of "expense" appearing upon the invoices (R. 200, 201, 214). Mr. Abell was merely instructed by Milton Hartman to bill these amounts, totaling $49,761.29, as expenses to Hartman Corporation. He couldn't recall any items upon the partnership books which might have covered these alleged expenses (R. 200).

Milton himself was unable to recall any specific item of expense included in the above figure (R. 274). Nor even any "types" of expense which might have made up that total (S. R. 38; R. 270, 274).

**The Corporation's creditors.** On May 31, 1946—but 1½ months following the last payment to the partnership under the above industrial and scientific research contract (Pl. Ex. 19, R. 121)—the unpaid accounts payable of the Corporation stood at **$99,997.49** (Pl. Ex. 28, R. 397). The records of the Corporation disclose that the accounts payable **rose steadily from that date** (Pl. Ex. 28, R. 397-409). On December 2, 1947, the date reorganization proceedings were instituted, the total unpaid accounts payable stood at **$423,359.93** (Pl. Ex. 28, R. 409).

The files of the Court below in the bankruptcy proceeding disclosed that provable claims aggregating a figure in excess of $1,300,000 had been filed against the Corporation (R. 40, 52). Of this amount, priority claims were in excess of $700,000; one such claim **was a claim of the United States for taxes,** in the total amount of $731,638.59, **the majority of which was for taxes, and the penalty and interest thereon, for the very years spanned by Counts VI and VIII, i. e., 1943-1945** (R. 52).

**Findings and Judgments of Courts Below and Applicable Statutes.** Plaintiff's evidence in proof of all of the above facts was uncontroverted. **Not a single one of the defendants testified** in person at the trial of this lawsuit **or otherwise offered any evidence to rebut, explain or justify any** of the transactions dealt with in either Count VI or Count VII (R. 52, 40, p. 7 of Opinion, Ct. of Apps.).

The trial court (Hon. Roy W. Harper) concluded from the above and other facts in evidence (R. 58, 38-39):

> "that the Hartman family partnership was created and organized by Milton Hartman for the purpose of milking from the Corporation its liquid assets for the benefit of himself and members of his family constituting the other members of the partnership and leaving the creditors of the Corporation to shift for themselves; that the profitable arrangement whereby the Corporation acquired generators and parts through the partnership, and the creation of, and operation under, the industrial and scientific research contract, were integral parts of the same scheme; that as soon as the Corporation no longer needed the aforesaid generators and parts, Milton Hartman then devised the scheme of securing for the partnership members additional sums by purporting to provide non-existent industrial and scientific research services; that the other defendants herein acted in concert with the said

Milton Hartman, and acquiesced and, so far as necessary, willingly participated in and assisted the said Milton Hartman in carrying each of said schemes into fruition; and that both the generators and parts sales, as well as the industrial and scientific research contract, and the monies appropriated from the Corporation thereunder, were integral parts of the general scheme to drain the assets of the Corporation into members of the Hartman family and shield same from the creditors of the Corporation."

Accordingly, the trial court held that plaintiff was entitled to recover all profits exacted by the partners from the generators and parts sales ($307,641.76) as well as from the "scientific research" contract ($109,761.29) upon the ground, amongst others, that all of the aforesaid payments were made for the purpose and with the intent to hinder, delay or defraud creditors of the Corporation, and that those payments were fraudulent and void under § 428.020 of the Missouri Statutes, and hence were void as to the Trustee under § 110e (1) of Title 11, U. S. C. (R. 59-60).

Section 70e (1) of the Bankruptcy Act [11 U. S. C. A., § 110e (1)] declares:

> "A transfer made or suffered * * * which, under any Federal or **State law** applicable thereto, is fraudulent as against or voidable for any other reason by any creditor of the debtor, having a claim provable under this title, shall be null and void as against the trustee * * *."

Section 428.020 of the Missouri Statutes (1949) reads, in part, as follows:

> "**428.020. Conveyances to defraud creditors, void.**—Every conveyance * * * of any estate or interest in * * * goods and chattels, or in things in action, * * * made or contrived with the intent to hinder, delay or

> defraud creditors of their lawful actions, damages, * * * debts or demands * * * shall be from henceforth deemed and taken as against said creditors * * *, **prior and subsequent**, to be clearly and utterly void." (Emphasis added.)

On appeal the Court of Appeals, speaking through the Hon. Charles Whittaker, 238 F. 2d 881, held that, notwithstanding the language of § 428.020, the transactions in question were only fraudulent as to "existing" creditors. The Court further ruled that the United States Government became an "existing" creditor on July 15, 1944, the date of origin of its tax claim, i. e., the date that, by statute, the Corporation became obligated to file its federal tax return for the fiscal year ending April 30, 1944, and to pay the **correct** amount of tax due thereon (pp. 11, 12 of Opinion; p. 2 of "rehearing" opinion). Accordingly, the Court of Appeals affirmed the judgment on Count VII but remanded Count VI for a new trial; this was based upon the Court's statement that it couldn't determine from the state of the Record what portion of the Count VI transactions occurred subsequent to July 15, 1944 (p. 13 of Opinion).

## ARGUMENT.

### I.

### Petitioners' Petition for Certiorari Does Not Comply With Applicable Supreme Court Rules.

Supreme Court Rule 21 (2) [28 U. S. C., Sup. Ct. Rule 21 (2)] provides that "It shall be the duty of counsel for the petitioner to notify all respondents * * * of the date of filing and of the docket number of the case, and to indicate thereon the contents of the record filed under this rule * * *."

Respondent has not been so notified.

In addition, and far more serious, Petitioners' "Statement" (pp. 6-10) is comprised of misstatements of fact liberally intermingled with other matters stated as "facts" upon which there was no evidence whatever. As is customary in such circumstances, of course, Petitioner's "Statement" is completely void of any reference whatsoever to just where in the Record these "allegations" may be substantiated.

For example:

(1) Defendants made no evidentiary showing whatever to support any of the allegations comprising page 6 of the "Statement."

(2) At the top of page 7, Petitioners claim that all of the Count VI transactions occurred between September 1, 1943, **and July, 1944.** This latter date is wrong! Generator and parts sales were still being transacted in **February of 1945** (R. 48, 96, 122; also p. 5 of Ct. of Apps. Opinion). Indeed, the reason Count VI was remanded, stated the Court of Appeals at page 13, was because it couldn't determine the specific generator and parts transactions which had occurred **between** July 15, 1944 (see p. 3 of Opinion on Rehearing) **and February 5, 1945** (p. 13, Opinion).

(3) In the next paragraph (page 7 of Petition) Petitioners assert that the "last money" under the Count VII transactions was paid January 13, 1946. The correct date was **March 15, 1946** (Pl. Ex. 19, R. 121).

(4) On pages 8 and 10 of the Petition, Petitioners assert:

> (a) that the $731,638.59 tax claim of the United States "**has been abandoned** by the Collector"; hence, the Government is not a creditor of Hartman Corporation (p. 8);
>
> (b) that this Government tax claim is non-existent because it was never **assessed**—but that, notwithstanding, the **Court of Appeals found** that a report of "an examining agent **amounted to an assessment**" (p. 10; see also pp. 14, 15); then
>
> (c) that assessment did not take place "within the two year period of limitation"; and that the "claim of the Internal Revenue Department has been abandoned and under the Federal Law outlawed" (p. 10).

All of this is pure buncombe—unfounded either in fact or in law. It is certainly not what the Court of Appeals "found"—or stated that it found (p. 2, Opinion on Rehearing).

United States tax officials, informed of Petitioners' assertions, were quite shocked to learn that they had "abandoned" their right to $731,638.59 in back taxes. Or that they, through neglect of duty, had somehow failed to make any assessment of these taxes.

To refute these unfounded charges, the Government quickly assembled for Respondent the documents attached to this Brief, to-wit: Respondent's Exhibit 1, Certificate of Assessments and Payment, dated 4/24/57, executed by Ernest M. Flinn, District Director of Internal Revenue,

reflecting tax assessments (corporation income and excess profits) made April 28, 1948—but five months (not more than two years, as Petitioners claimed) after reorganization proceedings—against Hartman Corporation covering taxable years ending 4/30/44, 4/30/45 and 4/30/46; Exhibit 2, being certified photostatic copy of Commissioner's Assessment List, dated 4/28/48; and Exhibit 3, copy, certified by Ernest M. Flinn, District Director, of amended claim of United States "for taxes due in the matter of the Hartman Corporation of America"; the reverse side shows that this proof of claim was filed in the District Court on May 18, 1948.

In these circumstances, it is difficult to believe that Petitioners are proceeding in good faith in their assertions that there had never been any assessment—or that the Government had "abandoned" its right to this prodiguous tax liability.

In the light of these Exhibits, of course, it is also evident that §§ 6871 and 6872 (26 U. S. C. A.), quoted upon pages 42 and 43 of Petitioners' Petition are not germane. The assessments in the Hartman Corporation case were made within five months of reorganization proceedings—not more than two years thereafter, as Petitioners argue. Hence, these tax claims were not "outlawed", as Petitioners would lead us to believe (p. 10 of Petition).

In any event, these baseless and false charges would hardly seem to measure up to the candor and accuracy demanded of Rule 23, paragraph 4 (28 U. S. C. A. Rule 23); they constitute reason alone to deny the Petition.

## II.

### The Petition for Certiorari Fails to Disclose Any "Special and Important" Reasons for Granting the Writ, as Required by Supreme Court Rule 19.

Rule 19 (28 U. S. C., Sup. Ct. Rule 19), reminds counsel that a review on writ of certiorari is not a matter of right,

but "will be granted **only** where there are special and important reasons therefor".

Let's hold the questions which Petitioners wish to have reviewed by the Court to this test.

Petitioners, on pages 3-4, argue first that there was **no evidence** that the Corporation and the partnership were organized simultaneously for the purpose of "milking from the corporation its liquid assets", and, upon this premise, state the first question to be: can fraud be inferred under those circumstances.

This is primarily a question of fact. Jurisdiction on certiorari was not conferred merely to give the defeated party in the lower court another hearing (**Magnum Import Co. v. Coty**, 262 U. S. 159, 43 S. Ct. 531, 67 L. Ed. 922, 924), or merely to review the evidence or inferences drawn from it (**General Talking Pictures Corp. v. Western Electric Co.**, 304 U. S. 176, 58 S. Ct. 849, 82 L. Ed. 1273, 1275; see also **Southern Tire Company v. North Carolina Public Service Company**, 263 U. S. 508, 68 L. Ed. 413).

The second question sought to be reviewed by Petitioners (page 4) is whether the District Court and the Court of Appeals erred as a matter of law in finding that filing of the United States tax claim, allegedly "outlawed," brought the partnership transactions within Section 110e (1) (11 U. S. C. A.). Petitioners offered no proof or evidence or authorities to substantiate portions of this charge; other portions are refuted by the copies of the United States tax records hereto attached (Respondents' Exhibits 1-3).

Petitioners, for Question III, after transforming the date, March 15, 1946 (Pl. Ex. 19, R. 121), into January 13, 1948, cryptically ask "Can a judgment for a **preference** under **the section** of the Bankruptcy Act relied upon be sustained * * *?" (p. 4 of Petition).

There is no need to resort to certiorari—and the Supreme Court—for an answer to this question. The answer

is readily apparent here in St. Louis. The judgment of the courts below is not for a "preference"—and the sections of the Bankruptcy Act dealing with "preferences" have no part whatever in this case. The balance of Question III is no more than a matter of local or state law.

In Question denominated as IV (pp. 4-5 of Petition), Petitioners seek to estop the Trustee in Bankruptcy from recognizing the United States Government as a creditor of Hartman Corporation because the Trustee in Reorganization, prior to adjudication in bankruptcy, resisted the Government's claim.

This Court will take judicial notice that tax claims are customarily resisted—but that such fact does not cause the claims to disappear—or to make the liability therefor any less real.

Petitioners' final question (V on p. 5) is whether the judgment in the case of Hartman et al. v. Lauchli, Trustee, 194 F. 2d 787, was res adjudicata as to the judgment of the lower courts in this case.

The answer is: No! The carrier case concerned an entirely **different controversy**, to-wit, a suit for specific performance of a contract with a Hartman Corporation creditors committee to convey certain real estate, and was based upon a completely different evidentiary showing. The **parties** to the suit were different; the **issues** were different; the **subject matter** was different. There is no merit in this argument.

The questions which Petitioners seek this Court to review are not matters of general public importance; they reflect no more than Petitioners' desire for a second appeal. These questions neither disclose, nor do Petitioners claim, that: (a) the Court of Appeals' decision is "in conflict with the decision of another court of appeals * * *"; or (b) that the Court of Appeals "decided an important state * * * question in a way in conflict with applicable

state * * * law"; or (c) "decided an important question of federal law which has not been, but should be, settled by this court"; or (d) "decided a federal question in a way in conflict with * * * decisions of the court"; or (e) "so far departed from the accepted and usual course of judicial proceedings * * * as to call for an exercise of this court's power to supervision" (Supreme Court Rule 19, 28 U. S. C., Sup. Ct. Rule 19).

Certiorari is, of course, a matter of "sound judicial discretion." This case has been in the Courts for **nine** years. It was fully tried in the District Court and carefully reviewed in the Court of Appeals. No "special", or "important", or any other, reasons are disclosed for granting certiorari. Under these circumstances, "sound judicial discretion" demands that the Petition be denied.

III.

**The United States Government Became an Existing Creditor of Hartman Corporation No Later Than July 15, 1944, the Date the Corporation's Federal Income Tax Return for Fiscal Year Ending April 30, 1944, Was Required to Be Filed and the Corporation Became Obligated, But Failed to Pay the Correct Amount of Tax Due.**

The District Court held that the United States Government was an existing creditor of Hartman Corporation during the years 1943, 1944 and 1945 (R. 52). The Court of Appeals ruled that the Government became such on July 15, 1944, the date it was required by law to file its return for the fiscal year ending April 30, 1944, and to pay the correct amount of tax due thereon. Accordingly, the Court of Appeals found that Counts VI and VII transactions, to the extent they occurred **subsequent to July 15, 1944**, were fraudulent as to existing creditors and void as to the Trustee (pp. 11-12 of Opinion, p. 2 of Rehearing Opinion).

Indeed, there can be little question here that one of the primary purposes of the income-splitting transactions embodied in Counts VI and VII was to circumvent income tax liability to the Government. Confessed and "reasoned" defendants in their Brief to the Court of Appeals (p. 68): "• • • it was far better for the welfare of the bankrupt corporation, at that time, to pay out profits to the family partnership than it would have been to pay them out as dividends and thus be forced to pay a corporate income tax as well as an individual income tax, or double income tax, on the same income."

Petitioners now urge that the United States could not become a creditor of Hartman Corporation—as to delinquent taxes—until at least after tax assessments had been made—and further that there have never been any taxes assessed in this case (pp. 14-15 of Petition).

Respondent's Exhibits 1 and 2, attached hereto, refute the latter charge completely. And federal case authorities are uniformly opposed to the first argument. Moreover, as will be discussed, the federal revenue statutes themselves show beyond all doubt that **the obligation to pay taxes arises on the date the return is required by law to be filed.**

Hartman Corporation was on an April 30 fiscal year basis (p. 2 of Opinion, Ct. of Apps.; Exh. 1 attached hereto).

On or about **April 28, 1948** (See Exh's 1 and 2 hereto attached; also R. 52, 40), the Government **assessed** tax deficiencies against the Corporation in substantial amounts for the taxable years 1943, 1944 and 1945, ending April 30, 1944, April 30, 1945 and April 30, 1946, respectively. **This was the very period during which the Count VI and VII transactions occurred.** The amounts of the unpaid taxes for each of those years, the character of the tax, and the amount of penalties and interest which have accrued thereon, are clearly reflected upon the attached Certificate

of Assessments (Exhibit 1). Actually, the Government occupies a special status with reference to its tax claims. Text book authorities recognize that because of the Government's statutory right to issue execution, it is in the position of a judgment creditor [Vol. 1, Glenn, Fraudulent Conveyances and Preferences, § 73 (b), p. 121 et seq.].

It is crystal clear from the Internal Revenue Code itself, as well as federal case authorities, that tax **liability** springs from the **last date upon which the annual return is required to be filed**; the **correct** amount of tax becomes due at that time, **irrespective of the date when a claim, or deficiency assessment, may be made** (Vol. 4, Fed. Tax Rep. C. C. H., '56, para. 5231, p. 44078).

Section 56 of the 1939 Revenue Code (26 U. S. C. A. § 56, now § 6151), in effect during the years in question, provided:

> "(a) **Time of payment.** The total amount of tax imposed by this chapter shall be paid * * *, if the return should be made on the basis of a fiscal year, * * * **on the 15th day of the third month following the close of the fiscal year.**" (Emphasis added.)

In other words, the final date for payment of the balance of a tax on income is the same as the due date of the return (Vol. 4, Fed. Tax Rep. C. C. H., '56, para. 5233).

Thus, the **obligation** of Hartman Corporation **to pay** the **correct** amount of taxes for the fiscal year ending April 30, 1944, arose July 15, 1944; for the fiscal year ending April 30, 1945, July 15, 1945, and so on. The date of assessment has nothing whatever to do with the date the **indebtedness** accrued.

And it follows, of course, that the Government, as to unpaid 1943 taxes, became **a creditor** of Hartman Corporation on July 15, 1944. And, as to unpaid 1944 taxes, on July 15, 1945.

Indeed, tax liability is like any other civil liability. As any other indebtedness which is not paid in full when due, any tax "imposed by" the Act which "is not paid on or before the last day prescribed for payment" likewise shall bear **interest** (on the amount not so paid) from said day (the due date) to the date of payment (§ 6601, 1950 Rev. Code, 26 U. S. C. A., §6601). "Interest * * * shall be paid on any unpaid amount of tax from the **last** date prescribed for payment of the tax * * * to the date on which payment is received" (Regs. 301.6601-1; Vol. 4, Fed. Tax Rep. CCH '56, para. 5507).

Carrying the analogy further, there are also statutes of limitations, as the Court knows, upon collection of a tax claim. And, as on other civil claims, the "tax" statute of limitations commences to run from the date the obligation becomes due, i. e., **the date the correct amount of tax should have been paid,** not the date of assessment [26 U. S. C. A., § 6501; Regs. 301.6501 (a) 1].

Also in point is the statutory definition of the term "deficiency." A deficiency "is the difference between the amount of tax, if any, which is paid on the **due date**, and the **correct liability** for any taxable year" (Vol. 4, Fed. Tax Rep. CCH '56, para. 5316.01; See also 26 U. S. C. A., § 6211; Regs. 301.6211-1; **Morris v. Kurtzon**, 17 T. C. 1542).

The cases are uniformly in support.

In **Cumberland Portland Cement Co. v. U. S.**, 202 F. 2d 152 (per curiam), affirming 101 F. Supp. 577 (1952), the taxpayer had understated its tax liability in its **1942** return and had failed to pay the amount of tax actually due. In **1947** the Commissioner assessed the taxpayer with interest on the amount of such underpayment from the due date of the 1942 return; he never, however, assessed the taxpayer with any deficiency for the 1942 year. Irrespective of this, the taxpayer was held liable for interest, the lower court tersely stating (p. 579): "**The liability for taxes arises as soon as the taxpayer's return is due * * *.**"

In **U. S. v. Proctor** (D. C. Tex. '23), 286 Fed. 272, the court ruled that a tax on certain income became due on the collection date fixed by law, even though the liability **arose out of an item which the taxpayer did not believe to be taxable** and as to which the Government had not then made any demand for payment.

Reasoned the Court (p. 273):

> "* * * while it is true that as to ad valorem taxes there must be a formal act of assessment * * * before liability for a tax arises. Liability for income taxes arises and in some sense it may be said that they accrue at the time the gains, profits and income pass into the hands of the recipient. The return is required in any case before the day of the levy so that it is clear that **the tax is due**—that is, that the recipient of the gains, profits and income is liable for it—**before it is assessed**, as the return is only to ascertain if the liability exists and its extent. 26 R. C. L., § 127.
>
> "Upon this view it must be held that the taxes were due and payable by the defendant not at the time demand was made upon him **but at the time fixed by law, to-wit, June 30, 1914, when the tax would have been collected**" (emphasis added).

On rehearing the Court held, on the basis of **Billings v. United States**, 232 U. S. 261, at p. 284, 34 S. Ct. 421, 58 L. Ed. 596, that an unpaid federal tax was a debt, and that, like other debts, interest accrued thereon from the date the indebtedness arose, i. e., June 30, 1914.

A similar problem was presented in **Macatee, Inc., v. U. S.** (5th C. A. '54), 214 F. 2d 717, where the United States, in 1952, assessed claims for employment and social security taxes with respect to the taxable year 1951. The Court quoted, with approval, at length from the Proctor case, supra, and then stated (p. 720):

> "* * * 'taxes may be and often are collected without assessment' (citing cases). It has been observed

that 'the Federal income tax system is based upon a theory of self-assessment. It is a basic principle of that system that a taxpayer is under a duty **to correctly report** his taxable income and **to pay the proper amount of taxes due thereon.' Welp v. United States** (D. C. Ia.), 103 F. Supp. 551, 560. That observation holds true as to the employment and social security taxes here involved and **the taxpayer became liable** for them prior to the times the demands for payment were made on May 15, 1952, and July 31, 1952. * * *''

Similarly, in **C. I. R. v. Keller** (7th C. A. '32), 59 F. 2d 499, 502, the Court said that income taxes for the years 1920 to 1923, inclusive, though **not assessed until 1928,** "were current taxes during the respective years to which they relate, and since those respective years they **have been due and owing** from the company, notwithstanding the company and respondents were ignorant of their existence."

Upon the same point, also see **In re W. J. Marshall Co.** (D. C. Ga., '24), 3 F. 2d 192, 194 (where the tax assessment had not been made until subsequent to the corporation's bankruptcy), and **Pennsylvania Cement Co. v. Bradley Contracting Co.** (D. C. N. Y., '20), 274 Fed. 1003.

And in **Scott v. C. I. R.** (8th C. A., '41), 117 F. 2d 36, at p. 38; **U. S. v. Armstrong** (8th C. A., '28), 26 F. 2d 227, at p. 231; **Updike v. U. S.** (8th C. A., '25), 8 F. 2d 913, at page 918; and **U. S. v. Seyler** (D. C. Pa., '56), 142 F. Supp. 408, at p. 410, it was held that Federal income taxes, **though unknown to the stockholders and though not assessed until subsequent years,** are a potential liability of the corporation of which the stockholders are charged with notice, and that this "liability", though unknown at the time, must be considered in determining the solvency of the corporation.

Thus, in view of the foregoing authorities it is indisputable that the Government's tax claims for the taxable

years, 1943, 1944 and 1945 arose **concurrently with the due dates** of the federal returns for those years—irrespective of the date of assessment; and that the Corporation became **indebted to**, and a debtor of, the United States for unpaid taxes for the taxable year, 1943, upon the due date of that return, i. e., July 15, 1944.

It follows, therefore, that the Government was an **existing creditor** as to all Counts VI and VII transactions occurring subsequent to July 15, 1944.

With this in mind, let's turn our attention briefly to the pertinent provisions of the Bankruptcy Act and ascertain if the Government is a "creditor" under its provisions.

By definition, a "creditor" is "anyone who owns a debt, demand or claim provable in bankruptcy". [§ 1 (11) of Bankruptcy Act, 11 U. S. C. A. § 1 (11)].

A "debt", under § 1 (14) of the Act, is defined as "any debt, demand or claim provable in bankruptcy" [11 U. S. C. A. § 1 (14)].

We clearly established from the foregoing authorities that the Government tax claims for the years 1943, 1944, and 1945 were "debts, demands or claims" arising upon the due dates of the respective returns. Accordingly, the Government **is** a creditor under the Bankruptcy Act provided its "debt" or "claim" is "provable in bankruptcy".

It has long been held that tax claims are "provable" claims.

**Ingels v. Boteler**, 100 F. 2d 915, 918;
**In re Mercury Engineering**, 68 F. Supp. 376, 382;
**Remington on Bankruptcy**, 4th Edit., § 797.

Indeed, it is well established that under the 1938 Bankruptcy Act, taxes are treated the same as other "debts" provable in bankruptcy (**United States v. Roth** [2nd

C. A., 1948], 164 F. 2d 575, 577; **Saper v. City of New York** [2nd C. A. 1948], 168 F. 2d 268, 270-271; **City of New York v. Saper**, 336 U. S. 328, 93 L. Ed. 710, 715).

Accordingly, it is crystal clear that the United States Government was an existing creditor of Hartman Corporation from July 15, 1944, on, **and that all payments exacted from the Corporation on Count VII transactions, accordingly** were void under Section 428.020 of the Missouri Statutes. And, as the tax claims of the Government constituted claims provable in bankruptcy, it follows that the Count VII transactions were void as against the Trustee in Bankruptcy under Section 70e (1) of the Bankruptcy Act [11 U. S. C. A. § 110e (1)].

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Thus, Respondent respectfully submits that the Petition for Certiorari should be denied. Petitioners have not only failed to show any special reason calling for the exercise of the Court's discretion to issue the writ; they have also failed to show wherein the judgment of the lower courts was in error. Respondent, upon the other hand, has irrefutably shown that the facts contained in the Record supported the judgment on Count VII and that that judgment was in accord with well established legal principles. The Petition, under such circumstances, must be denied.

Respectfully submitted,

KENNETH TEASDALE,
506 Olive Street,
St. Louis 1, Missouri,
Attorney for Respondent.

Of Counsel:
COBBS, ARMSTRONG,
TEASDALE & ROOS,
and
CHARLES E. DAPRON,
506 Olive Street,
St. Louis 1, Missouri.

# APPENDIX.

1 18

Respondent's Exhibit #1

# CERTIFICATE OF ASSESSMENTS AND PAYMENTS

*(See instructions on reverse side)*

OFFICE OF DISTRICT DIRECTOR OF INTERNAL REVENUE
St. Louis 1, Missouri

IN RE: (NAME OF TAXPAYER) Hartman Corp. of America
Kenneth Teasdale Trustee
ADDRESS
5147 Natural Bridge Ave., St. Louis, Mo.
ATTENTION: (Symbols and date of letter)

TO:

The following is a transcript of the records of this office covering the accounts of the taxpayer named above in respect to (character of tax) Corp. and Excess Profit
For the (period covered) 4-30-44 thru 4-30-47

| 1. TAXABLE PERIOD | 2. LIST AND YEAR | 3. ACCT. NO. OR PAGE AND LINE | 4. AMOUNT ASSESSED | | PAID, ABATED, OR CREDITED 5. DATE OR SCHED. NO. | PAID, ABATED, OR CREDITED 6. AMOUNT | | 7. PAID AB. CR. | 8. ADJUSTMENT OF OVERASSESSMENTS |
|---|---|---|---|---|---|---|---|---|---|
| Corp. | | | | | | | | | Fm. 1120 Sub. |
| F-4-30-44 | 4-28-48 | Spl#6-00C | 2015 | 51 | | 38330 | 58 | OSB | 274B-D RAR |
| | | Pen. | 1007 | 76 | | | | | Int. to 4-28-48 |
| | | Int. | 457 | 80 | | | | | Fm.7658 5-3-48 |
| | | DVEP | 20177 | 62 | | | | | 57-M 5-18-48 |
| | | Pen. | 10088 | 81 | | | | | Lien filed 5-12-48 |
| | | Int. | 4583 | 08 | | | | | |
| Ex. Profit | | | | | | | | | |
| F-4-30-44 | 4-28-48 | Spl#6-02C | 102450 | 07 | | | | | Remarks as above. |
| | | Int. | 21849 | 73 | | | | | Fm. 1121 Sub. |
| | | Pen. | 51225 | 04 | | | | | |
| | | PWC | | | | 10245 | 01 | | PWC Offset. |
| | | | | | | 165279 | 83 | OSB | |
| Corp. | | | | | | | | | |
| F-4-30-45 | 4-28-48 | Spl#6-04C | 3247 | 16 | | 35927 | 60 | OSB | Remarks as Spl#6-00C |
| | | Int. | 542 | 72 | | | | | |
| | | DVEP | 19277 | 19 | | | | | |
| | | Pen. | 9638 | 60 | | | | | |
| | | Int. | 3221 | 93 | | | | | |
| Ex. Profit | | | | | | | | | |
| F-4-30-45 | 4-28-48 | Spl#6-06C | 178346 | 30 | | 297327 | 71 | OSB | " " " |
| | | Int. | 29808 | 26 | | | | | |
| | | Pen. | 89173 | 15 | | | | | |
| Corp. | | | | | | | | | |
| F-4-30-46 | 4-28-48 | Spl#6-08C | 21330 | 55 | | 41618 | 52 | OSB | " " " |
| | | Pen. | 10665 | 28 | | | | | |
| | | Int. | 2285 | 29 | | | | | |
| | | DVEP | 4565 | 51 | | | | | |
| | | Pen. | 2282 | 76 | | | | | |
| | | Int. | 489 | 13 | | | | | |
| | | | | | Con't. page 2 | | | | |

I certify that the foregoing transcript of the accounts of the taxpayer named above in respect to the taxes specified, is true and complete for the period stated, and that all assessments and payments of tax, penalty and interest, and all abatements, credits, and refunds relating thereto as disclosed by the records of this office are shown therein.

DATE OF CERTIFICATE 4-24-57

DISTRICT DIRECTOR OF INTERNAL REVENUE
Jesse M. Quinn

U. S. TREASURY DEPARTMENT · INTERNAL REVENUE SERVICE FORM 899 (REV. 10-54)

GPO 920237

RESPONDENT'S EXHIBIT 1.

# CERTIFICATE OF ASSESSMENTS AND PAYMENTS Page 2

*(See instructions on reverse side)*

OFFICE OF DISTRICT DIRECTOR OF INTERNAL REVENUE

St. Louis 1, Missouri

IN RE: (NAME OF TAXPAYER) Hartman Corp. of America
Kenneth Teasdale, Trustee

ADDRESS
5147 Natural Bridge Ave., St. Louis, Mo.

ATTENTION: (Symbols and date of letter)

TO:

The following is a transcript of the records of this office covering the accounts of the taxpayer named above in respect to (character of tax) Corp. and Excess Profit

For the (period covered) 4-30-44 thru 4-30-47

| 1. TAXABLE PERIOD | 2. LIST AND YEAR | 3. ACCT. NO. OR PAGE AND LINE | 4. AMOUNT ASSESSED | PAID, ABATED, OR CREDITED 5. DATE OR SCHED. NO. | 6. AMOUNT | 7. PAID AB. CR. | 8. ADJUSTMENT OF OVERASSESSMENTS |
|---|---|---|---|---|---|---|---|
| Ex. Profit 4-30-46 | 4-28-48- | Spl#6-10C | 73152 97 | | 117566 84 | OSB | Remarks same as SPL #6-00C |
| | | Pen. | 36576 49 | | | | |
| | | Int. | 7837 38 | | | | |
| Corp. F-4-30-47 | 4-28-48 | Spl#6-12C | 22106 29 | | 23148 31 | OSB | " " " |
| | | Int. | 1042 02 | | | | |

I certify that the foregoing transcript of the accounts of the taxpayer named above in respect to the taxes specified, is true and complete for the period stated, and that all assessments and payments of tax, penalty and interest, and all abatements, credits, and refunds relating thereto as disclosed by the records of this office are shown therein.

DATE OF CERTIFICATE 4-24-57

DISTRICT DIRECTOR OF INTERNAL REVENUE

Owen M. Gunn

U. S. TREASURY DEPARTMENT - INTERNAL REVENUE SERVICE

FORM 899 (REV. 10-54)

CPO 920137

RESPONDENT'S EXHIBIT 1.

— 25 —

Respondent's Exhibit No. 2

# United States of America

## GENERAL SERVICES ADMINISTRATION

April 23, 1957.

I HEREBY CERTIFY that the annexed copy (or each of the annexed copies) is a true copy of a record in the legal custody of the Administrator, General Services Administration, and filed among the records of the District Director of Internal Revenue Service of St. Louis, Missouri at the Federal Records Center, 2306 East Bannister Road, Kansas City, Missouri.

Harry Svanda
(Signature)

Chief, Reference Service Branch
(Title)

I CERTIFY THAT Harry Svanda, who signed the foregoing certificate, is the Chief of the Reference Service Branch at the Federal Records Center, 2306 East Bannister Road, Kansas City, Missouri, and his certification as such full faith and credit are and ought to be given.

IN TESTIMONY WHEREOF I, D. J. Ariagno Regional Director, Region 6, General Services Administration, have hereunto caused the Seal of the General Services Administration to be affixed and my name subscribed by the Chief, Federal Records Center, this 23rd day of April, 1957.

D J Ariagno
Regional Director

By H D Hunt
Chief, Federal Records Center

GSA-WASH DC 52-2737

GSA FORM 443 - September 1951

RESPONDENT'S EXHIBIT 2.

RES

Form 23C-1
TREASURY DEPARTMENT
INTERNAL REVENUE SERVICE
Form approved by Comptroller General, U. S.,
Aug. 31, 1938

ASSESSMENT CERTIFICATE

# COMMISSIONER'S ASSESSMENT LIST

APR 30 1948
O/E
ST. LOUIS OFFICE

1ST District of MISSOURI Month APRIL 28 SPECIAL #6 Year 1948

Additional Assessments made by Commissioner: Personal $

Corporation $729,[illegible].00

ATTACHMENT:

AUTHORIZATION TO OFFSET ASSESSMENTS FORM 7986-E

TOTAL THEREOF $10,245.01

Total Assessments $729,[illegible].00

I hereby certify that I have made inquiries, determinations, and assessments of taxes, penalties, etc., of the above classification specified in these lists, and find that the amounts of taxes, penalties, etc., stated as corrected and as specified in the supplementary pages of this list made by me are due from the individuals, firms, and corporations opposite whose names such amounts are placed, and that the amount chargeable to the collector is as above.

Dated at Washington, D. C.

Office of Commissioner of Internal Revenue, APRIL 28, 1948

Geo J. Schoeneman
Commissioner of Internal Revenue.

IT:CL:P7

RESPONDENT'S EXHIBIT 2.

BKMCN

# ASSESSMENT LIST

District FIRST MISSOURI, INCOME, List APRIL 1 1948 - SUPP - ANNUAL

| | | OLD BALANCE | DATE | DEBIT | CREDIT | NEW BALANCE | REMARKS |
|---|---|---|---|---|---|---|---|
| 0 | 23-C 4/28/48<br>HARTMAN CORP OF AMERICA<br>KENNETH TEASDALE TRUSTEE<br>5147 NATURAL BRIDGE AVE<br>ST L MO<br>4-28-48 SPL 6 00C 5-23-43/4-30-44 | | | TRANSFERRED TO ANNUAL LIST | | 38330 58 | LIEN 5/12/48<br>57-M- 5/18/48<br>0. |
| 1 | HARTMAN CORP OF AMERICA<br>KENNETH TEASDALE TRUSTEE<br>5147 NATURAL BRIDGE AVE<br>ST L MO<br>4-28-48 SPL 6 02C 5-22-43/4-30-44 | | | TRANSFERRED TO ANNUAL LIST | | 165279 83 | LIEN 5/12/48<br>57-M-FILED 5/18/48<br>1 |
| 2 | HARTMAN CORP OF AMERICA<br>KENNETH TEASDALE TRUSTEE<br>5147 NATURAL BRIDGE AVE<br>ST L MO<br>4-28-48 SPL 6 04C 4-30-45 | | | TRANSFERRED TO ANNUAL LIST | | 35927 60 | LIEN 5/12/48<br>57 M 5/18/48<br>2 |
| 3 | HARTMAN CORP OF AMERICA<br>KENNETH TEASDALE TRUSTEE<br>5147 NATURAL BRIDGE<br>ST L MO<br>4-28-48 SPL 6 06C 4-30-45 | | | TRANSFERRED TO ANNUAL LIST | | 297327 71 | LIEN 5/12/48<br>57 M 5/18/48<br>3 |
| 4 | HARTMAN CORP OF AMERICA<br>KENNETH TEASDALE TRUSTEE<br>5147 NATURAL BRIDGE AVE<br>ST L MO<br>4-28-48 SPL 6 08C 4-30-46 | | | TRANSFERRED TO ANNUAL LIST | | 41618 52 | LIEN 5/12/48<br>57 M 5/18/48<br>4 |
| 5 | HARTMAN CORP OF AMERICA<br>KENNETH TEASDALE TRUSTEE<br>5147 NATURAL BRIDGE<br>ST L MO<br>4-28-48 SPL 6 10C 4-30-46 | | | TRANSFERRED TO ANNUAL LIST | | 117566 84 | LIEN 5/12/48<br>57 M 5/18/48<br>5 |
| 6 | HARTMAN CORP OF AMERICA<br>KENNETH TEASDALE TRUSTEE<br>5147 NATURAL BRIDGE<br>ST L MO<br>4-28-48 SPL 6 12C 4-30-46 | | | TRANSFERRED TO ANNUAL LIST | | 23148 31 | LIEN 5/12/48<br>57 M 5/18/48<br>6 |
| 7 | 23/C APRIL 2 1948<br>BUSCH-SULZER BROS DIESEL ENGINE CO<br>NOW BEE-ESSBY CO<br>721 PESTALOZZI ST<br>ST L MO<br>4-2-48 529005 1945 | 5498 72<br>190 77 | 4-29 INC<br>6/15 INC | 5-12-49<br>6/27/49 | 5307 95<br>190 77 | 5498 72<br>0 00 | 7658 4-6-48<br>IT CLR 1 - LETTER 7/16/48 |
| 8 | FRED F FISCHER ADDL 1943<br>4399 MC-PHERSON<br>ST L MO 8 511112<br>APRIL 2 1948 | 3127 92 | 1/10/49 | | 3127 92 | 3127 92<br>0 00 | 69 - 2028 - 5/6/48<br>INT 138 97<br>8 |
| 9 | FRED F FISCHER ADDL 1944<br>4399 MC-PHERSON<br>ST L MO 8 511113<br>APRIL 2 1948 | 1125 61 | 1/10/49 | | 1125 61 | 1125 61<br>0 00 | 69 - 2029 - 5/6/48<br>INT 70 78<br>9 |

RESPONDENT'S EXHIBIT 2.

RES

TREASURY DEPARTMENT
INTERNAL REVENUE SERVICE
(Rev. March 1942)

# ASSESSMENT LIST

Page No.

District 1ST MISSOURI, INCOME TAX (Classification), List APRIL 28 1948 SPECIAL #6

| | | OLD BALANCE | DATE | DEBIT | CREDIT | NEW BALANCE | REMARKS |
|---|---|---|---|---|---|---|---|
| 0 | HARTMAN CORP OF AMERICA<br>KENNETH TEASDALE TRUSTEE<br>5147 NATURAL BRIDG AVE<br>ST LOUIS MO<br>M-28-48 SPL #6 10C M-30-46 | | EP<br>PEN<br>INT | 73152 97<br>36576 49<br>7837 38 | | 117566 84 | 7858 Jan 1 MAY 3 1948<br>1121 SUB<br>27MB-D RAR<br>INT TO M-28-48<br>Transferred to Annual List 1948 P 119 L 5<br>57 M FIL 5/26/48<br>LIEN FILED May 12, 1948 |
| 1 | | | | | | | |
| 2 | HARTMAN CORP OF AMERICA<br>KENNETH TEASDALE TRUSTEE<br>5147 NATURAL BRIDGE AVE<br>ST LOUIS MO<br>M-28-48 SPL #6 12C M-30-47 | | INT | 22106 29<br>1042 02 | | 23148 31 | 1120 SUB<br>27MB-D RAR<br>INT TO M-28-48<br>Transferred to Annual List 1948 P 119 L 6<br>Bonds issued MAY 3 1948<br>57 M FILE 5/18/48<br>LIEN FILED May 12, 1948 |
| 3 | | | | | | | |
| 4 | | | | | | | |
| 5 | | | | | | | |
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| 8 | | | | | | | |
| 9 | | | | | | | |

RESPONDENT'S EXHIBIT 2.

RES

TREASURY DEPARTMENT — INTERNAL REVENUE SERVICE

# ASSESSMENT LIST

Page No.

District: 1ST MISSOURI, INCOME TAX (Classification), List APRIL 28 1948 SPECIAL #6

| | | OLD BALANCE | DATE | DEBIT | CREDIT | NEW BALANCE | REMARKS |
|---|---|---|---|---|---|---|---|
| 0 | HARTMAN CORP OF AMERICA<br>KENNETH TEASDALE TRUSTEE<br>5147 NATURAL BRIDGE AVE<br>ST LOUIS MO<br>4-28-48 SPL #6 OOC 5-23-43/4-30-44 | | PEN<br>INT<br>DVEP<br>PEN<br>INT | 2015 51<br>1007 76<br>427 80<br>20177 62<br>10088 81<br>4583 08 | | 38330 58 | 1120 SUB<br>2748-0 RAR<br>INT TO 4-28-48<br>57 M FILED 5/18/48<br>LIEN FILED May 19, 1948 |
| 1 | Transferred to Annual List 1948 P. 119 L. 0 | | | | | | |
| 2 | HARTMAN CORP OF AMERICA<br>KENNETH TEASDALE TRUSTEE<br>5147 NATURAL BRIDGE AVE<br>ST LOUIS MO<br>4-28-48 SPL #6 02C 5-22-43/4-30-44 | | EP<br>INT<br>PEN<br>PNC | 102850 07<br>21849 73<br>51225 04 | 10245 01 | 169279 83 | 1121 SUB<br>2748-0 RAR<br>Date Issued MAY 3 1948<br>INT TO 4-28-48<br>PNC DEF'D<br>57 M FILED 5/18/48 |
| 3 | Transferred to Annual List 1948 P. 119 L. 1 | | | | | | |
| 4 | HARTMAN CORP OF AMERICA<br>KENNETH TEASDALE TRUSTEE<br>5147 NATURAL BRIDGE AVE<br>ST LOUIS MO<br>4-28-48 SPL #6 04C 4-30-45 | | INT<br>DVEP<br>PEN<br>INT | 3247 16<br>542 72<br>19277 19<br>6424 60<br>3221 93 | | 31927 60 | Date Issued MAY 3 1948<br>1120 SUB<br>2748-0 RAR<br>INT TO 4-28-48<br>57 M FILED 5/18/48<br>LIEN FILED May 19, 1948 |
| 5 | Transferred to Annual List 1948 P. 119 L. 2 | | | | | | |
| 6 | HARTMAN CORP OF AMERICA<br>KENNETH TEASDALE TRUSTEE<br>5147 NATURAL BRIDGE AVE<br>ST LOUIS MO<br>4-28-48 SPL #6 06C 4-30-45 | | EP<br>INT<br>PEN | 178546 30<br>29838 26<br>89173 15 | | 297327 71 | Date Issued MAY 3 1948<br>1121 SUB<br>2748-0 RAR<br>INT TO 4-28-48<br>57 M FILED 5/18/48 |
| 7 | Transferred to Annual List 1948 P. 119 L. 3 | | | | | | LIEN FILED May 19, 1948 |
| 8 | HARTMAN CORP OF AMERICA<br>KENNETH TEASDALE TRUSTEE<br>5147 NATURAL BRIDGE AVE<br>ST LOUIS MO<br>4-28-48 SPL #6 08C 4-30-46 | | PEN<br>INT<br>DVEP<br>PEN<br>INT | 21330 55<br>10665 28<br>2220 29<br>8882 51<br>2220 71<br>1109 13 | | 41618 52 | Date Issued MAY 3 1948<br>1120 SUB<br>2748-0 RAR<br>INT TO 4-28-48<br>57 M FILED 5/18/48 |
| 9 | Transferred to Annual List 1948 P. 119 L. 4 | | | | | | LIEN FILED May 19, 1948 |

RESPONDENT'S EXHIBIT 2.

I certify that the attached is a true copy of the second amended claim of the United States for taxes due in the matter of the Hartman Corporation of America, 6417 Manchester and 5147 Natural Bridge, St.Louis, Missouri, the confirmed copy of which is in my custody.

Ernest M. Klinn

District Director, Internal Revenue
St.Louis, Missouri

Respondent's
Exhibit #3

Signature Copy: Jas. J. O'Connor, Clerk
U.S.District Court, St.Louis,Mo.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN
DIVISION OF THE EASTERN DISTRICT OF MISSOURI

In the Matter of -
The Hartman Corp. of America
6417 Manchester & 5147 Natural Bridge
St. Louis, Missouri
Kenneth Teasdale, Trustee
Boatmen's Bank Building, St. Louis, Missouri

Index or Docket No. 11226

In REORGANIZATION

City of St. Louis )
State of Missouri ) SS

CLAIM OF UNITED STATES FOR TAXES

James P. Finnegan, Collector of Internal Revenue for the First Collection District of Missouri, a duly authorized agent for the United States in this behalf, being duly sworn, deposes and says:

1. That The Hartman Corp. of America above-named, is justly and truly indebted to the United States in the sum of $ 731,638.59 with interest thereon as hereinafter stated.

2. That the nature of the said debt is internal revenue taxes due pursuant to law as follows:

| Nature of Tax : Statute involved: | Year or Taxable : Period ended | : Amount of : Tax : | : With interest at the rate of 6% per annum until paid |
|---|---|---|---|
| FICA | 3/31/47 | Tax $ 1,931.88 | Plus Stat. Int. from 6/25/47 |
| | | Int 16.00 | " " " " " |
| FICA | 6/30/47 | Tax 1,110.64 | " " " " 8/28/47 |
| | | Int 5.11 | " " " " " |
| FICA | 9/30/47 | Tax 188.12 | " " " " 12/20/47 |
| | | Pen 11.85 | " " " " " |
| | | Int 1.56 | " " " " " |
| FICA | 12/31/47 | Tax 136.32 | " " " " 1/29/48 |
| | | Int .34 | " " " " " |
| FUTA | 1947 | Tax 504.28 | " " " " 2/27/48 |
| | | Int 1.24 | " " " " " |
| WITHHOLDING | 3/31/47 | Tax 4,205.05 | " " " " 6/18/47 |
| WITHHOLDING | 6/30/47 | Tax 4,326.81 | " " " " 8/28/47 |
| INCOME 5/23/43 to | 4/30/44 | Tax 2,815.51 | " " " " 5/ 3/48 |
| | | Pen 1,407.76 | " " " " " |
| | | Int 457.80 | " " " " " |
| EXCESS PROFITS 5/23/43 to | 4/30/44 | Tax 28,177.62 | " " " " " |
| | | Pen 10,888.81 | " " " " " |
| | | Int 4,583.68 | " " " " " |
| EXCESS PROFITS | 4/30/44 | Tax 102,450.07 | " " " " " |
| | | Pen 51,225.04 | " " " " " |
| | | Int 21,849.73 | " " " " " |
| | Post War Credit | 10,245.01 | |
| INCOME | 4/30/45 | Tax 3,847.16 | " " " " " |
| | | Int 346.72 | " " " " " |
| EXCESS PROFITS | 4/30/45 | Tax 29,277.19 | " " " " " |
| | | Pen 9,638.60 | " " " " " |
| | | Int 3,221.93 | " " " " " |
| EXCESS PROFITS | 4/30/45 | Tax 178,346.38 | " " " " " |
| | | Pen 89,173.15 | " " " " " |
| | | Int 29,868.26 | " " " " " |
| INCOME | 4/30/46 | Tax 21,330.55 | " " " " " |
| | | Pen [illegible] | " " " " " |

RESPONDENT'S EXHIBIT 2

| Statute involved: | Period ended | Tax | | of 6% per annum until paid |
|---|---|---|---|---|
| FICA | 3/31/47 | Tax | $ 1,931.88 | Plus Stat. Int. from 6/25/47 |
| | | Int | 16.00 | |
| FICA | 6/30/47 | Tax | 1,110.64 | 8/28/47 |
| | | Int | 5.11 | |
| FICA | 9/30/47 | Tax | 188.12 | 12/29/47 |
| | | Pen | 11.85 | |
| | | Int | 1.56 | |
| FICA | 12/31/47 | Tax | 136.32 | 1/29/48 |
| | | Int | .34 | |
| FUTA | 1947 | Tax | 504.28 | 2/27/48 |
| | | Int | 1.24 | |
| WITHHOLDING | 3/31/47 | Tax | 4,205.05 | 6/18/47 |
| WITHHOLDING | 6/30/47 | Tax | 4,326.81 | 8/28/47 |
| INCOME 5/23/43 to | 6/30/44 | Tax | 2,615.51 | 5/ 3/48 |
| | | Pen | 1,007.76 | |
| | | Int | 457.80 | |
| EVEP 5/23/43 to | 6/30/44 | Tax | 20,177.62 | |
| | | Pen | 10,088.81 | |
| | | Int | 4,583.68 | |
| EXCESS PROFITS | 6/30/44 | Tax | 102,450.07 | |
| | | Pen | 51,225.04 | |
| | | Int | 21,849.73 | |
| | Post War Credit | | 10,245.01 | |
| INCOME | 6/30/45 | Tax | 3,247.16 | |
| | | Int | 502.72 | |
| EVEP | 6/30/45 | Tax | 19,277.19 | |
| | | Pen | 9,638.60 | |
| | | Int | 3,221.93 | |
| EXCESS PROFITS | 6/30/45 | Tax | 178,346.30 | |
| | | Pen | 89,173.15 | |
| | | Int | 29,808.26 | |
| INCOME | 6/30/46 | Tax | 21,330.55 | |
| | | Pen | 10,665.28 | |
| | | Int | 2,285.29 | |
| EVEP | 6/30/46 | Tax | 4,568.51 | |
| | | Pen | 2,284.26 | |
| | | Int | 489.13 | |
| EXCESS PROFITS | 6/30/46 | Tax | 73,152.97 | |
| | | Pen | 36,576.49 | |
| | | Int | 7,837.38 | |
| INCOME | 6/30/47 | Tax | 22,106.29 | |
| | | Int | 1,658.02 | |
| | | Total | $731,638.89 | |

GOVERNMENT'S EXHIBIT

3. That no part of said debt has been paid, but that the same is now due and payable at the office of the Collector of Internal Revenue at St. Louis, Missouri.

4. That there are no set-offs or counterclaims to said debt.

5. That the United States does not hold, and has not, nor has any person by its order, or to deponent's knowledge or belief, for its use, had or received, any security or securities for said debt, except statutory liens.

6. That the said indebtedness is now due and payable; that no note or other negotiable instrument has been received for said debt or any part thereof; and that no judgment has been rendered thereon.

7. That said debt has priority, and must be paid in full in advance of distribution to creditors, as and to the extent provided in Section 64 or Section 659 of the Bankruptcy Act, Section 3466 of the Revised Statutes; or other applicable provisions of law. Attention is also called to the provisions of Section 3467 of the Revised Statutes, with respect to the personal liability of every executor, administrator, assignee or other person who fails to pay the claims of the United States in accordance with their priority.

Dated this 18th day of May 1948

Subscribed and sworn to before me
this 18th day of May 1948

Margaret McBoren
NOTARY PUBLIC

James P. Finnegan
Collector of Internal Revenue for
the First District of Missouri

MY COMMISSION EXPIRES FEB. 19th, 1951

Receipt is acknowledged this 19th day of May 1948 of original copy of claim as shown on the reverse side of this sheet.

James F. O'Connor
Clerk, U. S. District Court

Served the within Proof of Claim in the City of St. Louis, Mo., on the 18th day of May, 1948 by delivering a true copy thereof to

James J. O'Connor, Clerk
U.S. District Court St. Louis Mo

Time of Service: 1:05 P.M.

Virginia C. McCormick
Zone Deputy Collector